TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1965

No. 45

RONALD R. CICHOS, PETITIONER,

vs.

INDIANA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF INDIANA

PETITION FOR CERTIORARI FILED DECEMBER 27, 1965
CERTIORARI GRANTED APRIL 4, 1966

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 850

RONALD R. CICHOS, PETITIONER,

vs.

INDIANA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

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IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

No. 7749—September Term, 1958

THE STATE OF INDIANA

vs.

RONALD RICHARD CICHOS

SECOND AMENDED AFFIDAVIT—Filed November 6, 1958

Count 1—Reckless Homicide

Count 2—Involuntary Manslaughter

Count 1

For Count 1—

Jay W. Dennis being duly sworn upon his oath, says:

That Ronald Richard Cichos, on the 28th day of September, 1958 at and in the County of Parke, in the State of Indiana, did then and there unlawfully and feloniously drive and operate a certain motor vehicle, to-wit: a Cadillac automobile, on United States Highway No. 36 and said highway was then and there maintained as a two-lane highway in the County of Parke and State of Indiana aforesaid, with reckless disregard for the safety of others by then and there operating his said automobile while under the influence of intoxicating liquor and by then and there driving and operating his said automobile on the half of said highway to his left and into and against an automobile in which Frank Glen Barber and Shella Mae Barber were then and there riding and the said Barber automobile was then and there driven and operated in its right half

of said United States Highway No. 36, and the said Ronald Richard Cichos did then and there and thereby cause the [fol. 24] death of the said Frank Glen Barber and Shella Mae Barber, and the said unlawful, reckless and wanton acts aforesaid of the said Ronald Richard Cichos was the proximate cause of the deaths of the said Frank Glen Barber and Shella Mae Barber, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State of Indiana.

Jay W. Dennis.

Duly sworn to by Jay W. Dennis, jurat omitted in printing.

[fol. 25] Count 2

For Count 2—

Jay W. Dennis being duly sworn upon his oath, says:

That Ronald Richard Cichos on the 28th day of September, 1958 at and in the County of Parke, in the State of Indiana, did then and there unlawfully and feloniously without malice either expressed or implied and involuntarily did kill Frank Glen Barber and Shella Mae Barber, human beings, by then and there unlawfully and feloniously driving and operating a motor vehicle, to-wit: a Cadillac automobile in and upon and along a certain highway at and in the County of Parke, and State of Indiana, to-wit: United States Highway No. 36 while he, the said Ronald Richard Cichos was then and there under the influence of intoxicating liquor and the said Ronald Richard Cichos did then and there unlawfully and feloniously, while under the influence of intoxicating liquor, drive and operate said automobile into and against an automobile then and there driven and operated on the said United States Highway No. 36 and in and on which the said Frank Glen Barber and Shella Mae Barber were then and there riding and said Ronald Richard Cichos did then and there unlawfully

and feloniously but involuntarily and without malice, inflict mortal wounds and injuries in and upon the bodies of the said Frank Glen Barber and Shella Mae Barber, of which they sickened and languished and from which mortal wounds did die on September 28, 1958 at and in the County of Parke and State of Indiana, contrary to the form of the [fol. 26] statutes in such cases made and provided and against the peace and dignity of the State of Indiana.

Jay W. Dennis.

Duly sworn to by Jay W. Dennis, jurat omitted in printing.

[fol. 27] [File endorsement omitted]

Witnesses:

Approved by me: Clelland J. Hanner, Prosecuting Attorney.

[fol. 35]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

ARRAIGNMENT OF DEFENDANT AND DEFENDANT'S PLEA OF NOT GUILTY—November 24, 1958

Comes the State of Indiana, by Clelland J. Hanner, Prosecuting Attorney. Also comes defendant, Ronald Richard Cichos in person and with his attorney Warren Buchanan. The Court instructed the Prosecuting Attorney to read the Second Amended Affidavit and each Count thereof and the statutes under which it was filed and the Court stated that the defendant had been informed fully of his constitutional and statutory rights in this matter and that the Court had already appointed him an attorney, Warren Buchanan, to defend him and defendant thereupon in person entered a plea of not guilty to each Count of said Second Amended Affidavit.

• • • • • • •

[fol. 36]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

ORDER BOOK ENTRY OF SUPREME COURT ORDERING TRIAL COURT TO SUSTAIN DEFENDANT'S MOTION FOR NEW TRIAL —July 24, 1962

The Supreme Court of the State of Indiana having reversed the Court's overruling of Defendant's Motion for a New Trial which has been filed in this Court this day and instructing the Court to sustain defendant's motion for a new trial and for further proceedings not inconsistent with the opinion filed, which is as follows:

[fol. 37]

IN THE SUPREME COURT, STATE OF INDIANA

On the 2nd day of July, 1962, being the 31st Judicial day of said May Term, 1962.

Hon. Norman F. Arterburn, C.J., Hon. Amos W. Jackson, J., Hon. Arch N. Bobbitt, J., Hon. Frederick Landis, J., Hon. Harold E. Achor, J., Associate Judges.

No. 29,954

IN THE CASE OF RONALD RICHARD CICHOS

VS.

STATE OF INDIANA

Filed July 24, 1962, James O. Trousdale, Clerk, Parke Circuit Court.

Appealed From the Parke Circuit Court.

Come the parties by their attorneys, and the Court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by Jackson, J.

Arterburn, C.J., Bobbitt and Landis, JJ. Concur.

Achor, J. Concurs in Result.

[fol. 38]

Filed July 2, 1962, Alice C. Whitecotton, Clerk.

Warren Buchanan, Rockville, Indiana, John P. Price, Cleon H. Foust, Indianapolis, Indiana, Attorneys for Appellant.

Hollowell, Hamill & Price, Indianapolis, Indiana, Of Counsel.

Edwin K. Steers, Attorney General of Indiana; Richard C. Johnson, Deputy Attorney General; Patrick D. Sullivan, Deputy Attorney General; William D. Ruckelshaus, Deputy Attorney General, Indianapolis, Indiana, Attorneys for Appellee.

IN THE SUPREME COURT OF INDIANA

No. 29954

RONALD RICHARD CICHOS, Appellant,

v.

STATE OF INDIANA, Appellee.

Appeal from the Parke Circuit Court, Hon. Clarence G. Powell, Judge.

OPINION AND JUDGMENT—Filed July 2, 1962

Jackson, J.

Appellant was charged by a second amended affidavit in two (2) counts with (a) violation of Acts 1939, ch. 48, S52, p. 289, being S47-2001a, Burns' 1952 Replacement, defining the offense of Reckless Homicide and (b) with violation of Acts 1941, ch. 148, S2, p. 447, being S10-3405, Burns' 1956 Replacement, defining the offense of involuntary man-

[fol. 39] slaughter. Trial was had by jury resulting in the

verdict finding the defendant guilty of the offense of reckless homicide as charged in count one of the affidavit. Thereafter, on February 16, 1960, the court sentenced the appellant to a term of not less than one (1) year nor more than five (5) years in the Indiana Reformatory and fined him in the sum of $500 plus costs of the trial.

The record in this cause is so voluminous that it is almost impossible to summarize without unduly extending this opinion. Appellant's original brief consisting of over 450 pages, appellees brief consisting of 55 pages and the transcript consisting of 1203 pages.

It will suffice to say that the sufficiency of the charges were challenged by motions to quash the affidavits, appellant also filed among others, motions to produce and suppress evidence, a motion for mistrial, a motion in arrest of judgment, a motion for a Venire De Novo and motion for a new trial containing five causes, 107 specifications and six accompanying affidavits.

Appellant's assignment of error is the single ground that "(t)he Court erred in overruling the appellant's motion for a new trial."

Basically the contentions here to be determined may be narrowed to the alleged error in permitting into evidence the results of certain blood tests allegedly made from samples taken from the appellant and from alleged error in refusing to give certain instructions, hereinafter discussed, [fol. 40] tendered by the appellant.

The factual situation preceding the events culminating in the institution of the prosecution, from which stems this appeal, may be briefly summarized as follows:

On September 28, 1958, appellant was involved in an automobile collision on U.S. Highway No. 36 about one mile west of Bellmore in Parke County, Indiana. Such collision resulting in the deaths of Mr. and Mrs. Frank Barber and the injury of appellant, he suffering a bilateral fracture of the lower jaw, laceration of the scalp, cerebral concussion rendering him unconscious and a fracture of the right forearm. The collision occurred at approximately 9:30 o'clock a.m.

Prior to the collision appellant had stopped at Sparks' restaurant in Hollandsburg. While there, he and several other persons, including one William Lowe, drank coffee. After drinking coffee and spending fifteen or twenty minutes in the restaurant while in the process, appellant and Lowe left the restaurant, appellant getting into his car and driving off in the direction of Bellmore.

Within minutes after leaving the restaurant appellant was involved in the head-on collision resulting in the deaths and injuries heretofore mentioned.

The instructions tendered by the appellant and refused by the court numbered 16, 21, 24, 25, 26, 42, 49 and 63, in pertinent part, read as follows:

"Instruction No. 16

"Proof that the accident which resulted in the deaths [fol. 41] of Frank Glen Barber and Shella Mae Barber arose out of the inadvertence, lack of attention, forgetfulness or thoughtlessness of the defendant, Ronald Richard Cichos, as the driver of the other automobile involved in the accident, or from an error of judgment of the part of the said Ronald Richard Cichos, will not support a charge of reckless homicide or of involuntary manslaughter, and in that event you must find the defendant not guilty of the charges of reckless homicide and involuntary manslaughter."

"Instruction No. 21

"Members of the jury, I instruct you, that if Ronald Richard Cichos was merely negligent in operating his automobile, then he is not criminally liable, and your verdict must be not guilty."

"Instruction No. 24

"I instruct you that if Ronald Richard Cichos due to error of judgment caused the collision, then he cannot be

guilty of reckless homicide or involuntary manslaughter, and your verdict must be not guilty."

"Instruction No. 25

"I instruct you if Ronald Richard Cichos due to forgetfulness or thoughtlessness, caused the collision, then he cannot be guilty of reckless homicide or involuntary manslaughter, and your verdict must be not guilty."

"Instruction No. 26

"Members of the jury, I instruct you, that one must intend to do, or omit to do the act resulting in injury to [fol. 42] another in order to be guilty of reckless homicide or involuntary manslaughter. Now if you believe that the defendant, Ronald Richard Cichos, did not intentionally commit the act and he was only negligent, then your verdict must be not guilty."

"Instruction No. 42

"Members of the jury, I instruct you that if the defendant was merely inadvertent in his driving then he cannot be found guilty of driving with reckless disregard for the safety of others."

"Instruction No. 49

"Members of the jury, I instruct you, if the defendant, Ronald Richard Cichos, through inadvertence, or lack of attention or thoughtless negligence, failed to see the other car involved in this accident, this would not be sufficient to support a conviction under the statute and you must find him not guilty."

"Instruction No. 63

"Members of the jury, I instruct you, negligent conduct without more will not support a finding of guilty for reckless homicide and involuntary manslaughter arising out of an automobile accident."

Appellant contends that he was entitled to have the jury instructed that mere negligence in the operation of a motor vehicle (although civil liability may arise) does not create a criminal liability.

The substance of these instructions was not covered by [fol. 43] any instructions given by the court.

It has been well established in Indiana that mere negligent operation of a motor vehicle does not render one so operating it criminally liable, should a death ensue.

Dunville v. State (1919), 188 Ind. 373, 123 N.E. 689;

Kimmel v. State (1926), 198 Ind. 444, 154 N.E. 16;

Beeman v. State (1953), 232 Ind. 683, 115 N.E. 2d 919.

Whether the evidence in this case establishes that the deaths alleged in the indictment occurred from a mere accident, from negligent conduct or from willful and/or wanton misconduct so as to amount to recklessness, is dependent on the weight given the various aspects of the case and the evidence by the jury. The very purpose of the jury is to determine, after deliberation and pursuant to the court's instructions, the legal category into which the jury feels the defendant's conduct falls. The appellant's theory of the evidence and the law establishing such theory was never given to the jury in any instructions.

It is therefore our decision that the failure to give appellant's tendered instructions above numbered and set forth, constituted such error as requires a reversal of this cause.

Other error assigned need not be, and is not here decided. [fol. 44] Judgment reversed and cause remanded with instructions to sustain appellant's motion for a new trial and for further proceedings not inconsistent with this opinion.

Arterburn, C.J., Bobbitt and Landis, JJ. Concur.
Achor, J. Concurs in Result.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 46]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

ORDER BOOK ENTRY ON REMAND SHOWING SUSTAINING BY TRIAL COURT OF DEFENDANT'S MOTION FOR NEW TRIAL

The Court now sustains defendant, Ronald Richard Cichos's Motion for a New Trial.

[fol. 59]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

ORDER BOOK ENTRY SHOWING ASSIGNMENT OF CAUSE FOR TRIAL

And afterwards towit April 9, 1963, being the 2nd Judicial day of the April 1963 term of said court, before the Honorable Clarence G. Powell, Judge thereof, the following further proceedings were had herein towit:

This cause assigned for trial June 13, 1963, at 10:00 o'clock A.M. C.D.T.

[fol. 82]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

ORDER BOOK ENTRY SHOWING DEFENDANT'S VERIFIED SPECIAL PLEA OF FORMER JEOPARDY FILED

And afterwards towit June 5, 1963, being the 51st Judicial day of the April 1963 term of said court, before the Honorable Clarence G. Powell, Judge thereof, the following further proceedings were had herein towit:

Comes defendant, Ronald Richard Cichos, by counsel and files verified Special Plea of Former Jeopardy addressed to the Second Count of the Second Amended Affidavit against him, which is as follows towit:

[fol. 83]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

Cause No. 7749

[Title omitted]

DEFENDANT'S VERIFIED SPECIAL PLEA OF FORMER JEOPARDY—Filed June 5, 1963

Comes now the defendant, Ronald Richard Cichos, by his counsel, Warren Buchanan and John B. McFaddin, and for an additional special plea herein, alleges and says:

1. That on November 6, 1958, a second amended affidavit in this cause was filed in the Parke Circuit Court; that in said second amended affidavit this defendant was charged in two counts with the statutory offenses of reckless homicide, by count 1 thereof, and involuntary manslaughter, by count 2 of said second amended affidavit; that a bench warrant was issued by the Parke Circuit Court for the arrest of said defendant on said charges; that this defendant was thereupon arrested and held to answer to said charges; that a copy of the second amended affidavit herein charging this defendant with such offenses, certified as true and correct by the Clerk of this Court, is attached hereto, made a part hereof and marked Exhibit "A".

2. That by its terms, said second amended affidavit [fol. 84] charged that this defendant on September 28, 1958, in Parke County, Indiana, committed the offenses of reckless homicide and involuntary manslaughter by then and there, unlawfully and feloniously, operating a motor vehicle upon and along a high way at and in the County of Parke, in the State of Indiana, while under the influence of intoxicating liquor, and that the said defendant then and there drove and operated his said automobile into and against an automobile then and there driven and operated on said highway

[File endorsement omitted]

and in and on which one Frank Glen Barber and Shella Mae Barber were then and there riding and that the said Frank Glen Barber and Shella Mae Barber were injured and wounded as a result of such collision and that they died as a result thereof on September 28, 1958.

3. That the defendant was arraigned in the Parke Circuit Court, before the judge thereof, on November 24, 1958, and entered a plea of not guilty to the charges of reckless homicide and involuntary manslaughter as contained in said second amended affidavit.

4. That during the months of November and December, 1959, this cause was tried in the Parke Circuit Court, and that the jury, at the trial of said cause, returned a verdict finding the defendant guilty of reckless homicide, as charged in said second amended affidavit; that the jury, at the trial of said cause, did not return a verdict finding the defendant guilty of unvoluntary manslaughter, as charged in count 2 of the second amended affidavit herein; that the Court [fol. 85] rendered judgment of conviction and sentence on the verdict in this cause on February 16, 1960; that the defendant filed a motion for new trial in said cause, and that such motion was over-ruled by the Court; that on August 12, 1960, and within the time granted by the Supreme Court of Indiana for such purpose, the defendant filed a transcript of the record and assignment of errors on an appeal of said conviction to said Supreme Court of Indiana; that on July 2, 1962, the Supreme Court of Indiana reversed the judgment of conviction of the defendant and this cause was remanded to this Court with instructions to sustain defendant's motion for new trial; that this cause is now assigned for re-trial in this Court for June 13, 1963; that a copy of the verdict returned by the jury herein finding the defendant guilty only of the offense of reckless homicide, certified as true and correct by the Clerk of this Court, is attached hereto, made a part hereof and marked Exhibit "B".

[fol. 88]

EXHIBIT "A" TO DEFENDANT'S VERIFIED SPECIAL PLEA, ETC.

IN THE PARKE CIRCUIT COURT

SEPTEMBER TERM, 1958

No. 7749

Count 1—RECKLESS HOMICIDE

Count 2—INVOLUNTARY MANSLAUGHTER

STATE OF INDIANA,
COUNTY OF PARKE, SS.

THE STATE OF INDIANA

vs.

RONALD RICHARD CICHOS

SECOND AMENDED AFFIDAVIT

COUNT 1

For Count 1—

Jay W. Dennis being duly sworn upon his oath, says:

That Ronald Richard Cichos, on the 28th day of September, 1958, at and in the County of Parke, in the State of Indiana, did then and there unlawfully and feloniously drive and operate a certain motor vehicle, to-wit: a Cadillac automobile, on United States Highway No. 36 and said highway was then and there of sufficient width for two lanes of automobile traffic and was then and there maintained as a two-lane highway in the County of Parke and State of Indiana aforesaid, with reckless disregard for the safety of others by then and there operating his said automobile while under the influence of intoxicating liquor and by then

and there driving and operating his said automobile on the half of said highway to his left and into and against an automobile in which Frank Glen Barber and Shella Mae Barber were then and there riding and the said Barber [fol. 89] automobile was then and there driven and operated in its right half of said United States Highway No. 36, and the said Ronald Richard Cichos did then and there and thereby cause the death of the said Frank Glen Barber and Shella Mae Barber, and the said unlawful, reckless and wanton acts aforesaid of the said Ronald Richard Cichos was the proximate cause of the deaths of the said Frank Glen Barber and Shella Mae Barber, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State of Indiana.

(Signed) JAY W. DENNIS

Subscribed and sworn to before me this 6th day of November, 1958.

(Signed) CLELLAND J. HANNER
Prosecuting Attorney, 68th
Judicial Circuit of Indiana

My Commission expires January 1, 1959.

[fol. 90] COUNT 2

For Count 2—

Jay W. Dennis being duly sworn upon his oath, says:

That Ronald Richard Cichos on the 28th day of September, 1958, at and in the County of Parke, in the State of Indiana, did then and there unlawfully and feloniously without malice either expressed or implied and involuntarily did kill Frank Glen Barber and Shella Mae Barber, human beings, by then and there unlawfully and feloniously driving and operating a motor vehicle, to-wit: a Cadillac automobile in and upon and along a certain highway at and in the County of Parke, and State of Indiana, to-wit:

United States Highway No. 36 while he, the said Ronald Richard Cichos was then and there under the influence of intoxicating liquor and the said Ronald Richard Cichos did then and there unlawfully and feloniously, while under the influence of intoxicating liquor, drive and operate said automobile into and against an automobile then and there driven and operated on the said United States Highway No. 36 and in and on which the said Frank Glen Barber and Shella Mae Barber were then and there riding and said Ronald Richard Cichos did then and there unlawfully and feloniously but involuntarily and without malice, inflict mortal wounds and injuries in and upon the bodies of the said Frank Glen Barber and Shella Mae Barber, of which they sickened and languished and from which mortal wounds did die on September 28, 1958 at and in the County of Parke and State of Indiana, contrary to the form of the [fol. 91] statutes in such cases made and provided and against the peace and dignity of the State of Indiana.

(Signed) JAY W. DENNIS

Subscribed and sworn to before me this 6th day of November, 1958.

(Signed) CLELLAND J. HANNER
Prosecuting Attorney, 68th
Judicial Circuit of Indiana

My Commission expires January 1, 1959.

[fol. 92]
EXHIBIT "B" TO DEFENDANT'S VERIFIED SPECIAL PLEA, ETC.

IN THE PARKE CIRCUIT COURT

SEPTEMBER TERM, 1959

Cause No. 7749

STATE OF INDIANA,
COUNTY OF PARKE, *ss.*:

THE STATE OF INDIANA

vs.

RONALD RICHARD CICHOS

Verdict

We, the jury, find the defendant guilty of Reckless Homicide as charged in Count One of the Affidavit and find his age to be 26 years.

/s/ DEWEY HAZLETT
Foreman

[fol. 93] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 94] Certificate of Service (omitted in printing).

[fol. 96]
IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

ORDER BOOK ENTRY SHOWING FILING OF APPELLANT'S DEMURRER TO DEFENDANT'S VERIFIED SPECIAL PLEA OF FORMER JEOPARDY

And afterwards towit June 10, 1963, being the 55th Judicial day of the April 1963 term of said court, before

the Honorable Clarence G. Powell, Judge thereof, the following further proceedings were had herein towit:

Comes State of Indiana, by Earl M. Dowd, Prosecuting Attorney, and files demurrer to defendant's Verified Special Plea of Former Jeopardy, which is as follows:

[fol. 97]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

No. 7749

[Title omitted]

APPELLANT'S DEMURRER TO DEFENDANT'S VERIFIED SPECIAL PLEA OF FORMER JEOPARDY—Filed June 10, 1963

Comes now State of Indiana by Earl M. Dowd, Prosecuting Attorney and demur to defendant "verified special plea of former jeopardy" on each of the following grounds:

1. Said verified special plea of former jeopardy does not state facts sufficient to bar a prosecution by the State of Indiana of the defendant on the charge of involuntary manslaughter as contained in the second count of the second amended affidavit herein.

2. Said verified special plea of former jeopardy does not state facts sufficient for the State of Indiana to dismiss the charge of involuntary manslaughter contained in the second count of the second amended affidavit of hearing.

Earl M. Dowd, Prosecuting Attorney 68th Judicial Circuit of Indiana.

[File endorsement omitted]

Memorandum

By statute in the State of Indiana, Burns Indiana Stat-
[fol. 98] utes, Annotated replacement 9-1902 which says

"the granting of a new trial places the parties in the same position as if no trial had been had." The Courts have said by way of interpretation of this statute, that it is entirely clear that when the defendant ask for and obtained a new trial of the issue the results of previous trial were wholly vacated. He cannot under the indictment take a new trial as to the issue upon one count and not upon the other. If he obtained a new trial he was bound to take it upon the terms and conditions of the statute, and one of these conditions was that the parties should be placed in the same position as if no trial had been had. This point has been decided in many cases in this state and must be considered as settled, 159 Indiana 395—202 Indiana 397.

Certificate of Service (omitted in printing).

[fol. 99]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

ORDER BOOK ENTRY SHOWING APPELLANT'S DEMURRER TO DEFENDANT'S VERIFIED SPECIAL PLEA OF FORMER JEOPARDY SUSTAINED

And afterwards towit June 12, 1963, being the 57th Judicial day of the April 1963 term of said court, before the Honorable Clarence G. Powell, Judge thereof, the following further proceedings were had herein towit:

• • • • • • •

And the Court now sustains the demurrer of the State of Indiana to the Special Plea of Former Jeopardy by defendant and that said verified petition does not state facts sufficient to bar the prosecution or to dismiss the same.

• • • • • • •

[fol. 103]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

ORDER BOOK ENTRY SHOWING JURY IMPANELED AND READING OF COURT'S PRELIMINARY INSTRUCTIONS

And the Court now sustains the demurrer of the State cial day of the Adjourned April 1963 term of said Court, before the Honorable Clarence G. Powell, Judge thereof, the following further proceedings were had herein towit:

• • • • • • •

Jury heretofore impaneled to try this cause called to the jury box. Court reads Court's Preliminary Instructions numbered from 1 to 11, inclusive.

• • • • • • •

[fol.120]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

ORDER BOOK ENTRY SHOWING COMPLETION OF APPELLANT'S EVIDENCE IN CHIEF

AND

ORDER BOOK ENTRY SHOWING MOTION FOR COURT TO DIRECT JURY TO RETURN A VERDICT FOR THE DEFENDANT AND FOR DISCHARGE OF DEFENDANT AT CONCLUSION OF APPELLANT'S CASE IN CHIEF FILED

And afterwards towit June 25, 1963, being the 68th Judicial day of the Adjourned April 1963 term of said court, before the Honorable Clarence G. Powell, Judge thereof, the following further proceedings were had herein towit:

Comes the State of Indiana, by Earl M. Dowd, its Prosecuting Attorney. Comes defendant, Ronald Richard Cichos, in person and by his counsel, Warren Buchanan and John B. McFaddin. Comes Margaret Berrisford, Court Reporter. Comes the jury heretofore impaneled to try this cause. Trial resumed and evidence heard. State completes its evidence in chief and rests. Jury excused.

Comes defendant, by his counsel, and at the close of the State's case in chief, files written motion for the Court to direct Jury to Return a Verdict for the defendant and for discharge of the defendant at conclusion of State's Case in Chief, which is as follows:

[fol. 121]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

Extended April Term, 1963

No. 7749

[Title omitted]

MOTION OF DEFENDANT FOR THE COURT TO DIRECT JURY TO RETURN VERDICT FOR THE DEFENDANT AND FOR DISCHARGE OF THE DEFENDANT AT CONCLUSION OF STATE'S CASE IN CHIEF—Filed June 25, 1963

Comes now the defendant, by his attorneys, Warren Buchanan and John B. McFaddin, at the conclusion of the prosecution's case in chief and after the prosecution has rested and before the introduction of evidence in support of the defendant's defense and moves the Court to forthwith direct a verdict herein for the defendant and to discharge the defendant from custody, and tenders and offers an instruction for such purpose, for the following reasons and for each of said reasons, separately and severally considered, to-wit:

1. The prosecution has wholly failed to prove and establish by competent evidence beyond a reasonable doubt that the offenses alleged and charged in the 2nd Amended Affidavit, or either of them, or any offense included therein, were committed as charged in said 2nd Amended Affidavit.

2. The prosecution has wholly failed to prove and estab-
[fol. 122] lish by competent evidence beyond a reasonable

[File endorsement omitted]

doubt the corpus delicti of the offenses of Reckless Homicide or Involuntary Manslaughter, or either of them, as charged in the 2nd Amended Affidavit.

3. The competent evidence by the State and admitted by the Court is not sufficient to sustain a verdict of guilty.

4. There is not a sufficient amount of competent, admissible evidence in the record from which the jury can find that the State has proved the material allegations of either count of the 2nd Amended Affidavit beyond all reasonable doubt in accordance with Court's Preliminary Instructions Numbered 5, 7, and 8.

5. The defendant at the original trial of this case was acquitted and, by implication, found not guilty of Involuntary Manslaughter, as charged in Count 11 of the 2nd Amended Affidavit. The defendant cannot be tried more than one time for the same offense. Therefore, in the present trial, the jury should be directed to return a verdict finding the defendant not guilty of the offense of Involuntary Manslaughter charged in Count 11 of the 2nd Amended Affidavit.

Wherefore, the defendant asks that the jury be forthwith directed to return a verdict herein finding the said defendant not guilty of the offenses charged in the 2nd Amended Affidavit, or of any lesser degree thereof, or of any offenses included therein, and that he be discharged.

[fol. 123] Filed in open court this 25th day of June, 1963.

Ronald Richard Cichos, Defendant, By: Warren Buchanan, John B. McFaddin, His Attorneys.

Corrected C.G.P. Judge.
6/25/63 P.C.C.

[fol. 124]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

Extended April Term, 1963

No. 7749

[Title omitted]

INSTRUCTION DIRECTING JURY TO RETURN VERDICT FOR DEFENDANT TENDERED WITH DEFENDANT'S WRITTEN MOTION FOR SUCH PURPOSE

Instruction No. A

Members of the jury you are directed to immediately and forth-with return a verdict finding the defendant not guilty of the offenses charged in the 2nd Amended Affidavit in this cause.

....., Judge, the Parke Circuit Court.

Refusal, 6/25/63.
C.G.P., Judge, P.C.C.

[fol. 125]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

Extended April Term, 1963

No. 7749

[Title omitted]

INSTRUCTION DIRECTING JURY TO RETURN VERDICT FOR DEFENDANT TENDERED WITH DEFENDANT'S WRITTEN MOTION FOR SUCH PURPOSE

Instruction No. B

Members of the jury you are directed to immediately and forth-with return a verdict finding the defendant not guilty

of the offense charged in Count 11 of the 2nd Amended Affidavit in this cause.

....., Judge, the Parke Circuit Court.

Refused, 6/25/63.
C.G.P., Judge, P.C.C.

[fol. 126]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

ORDER BOOK ENTRY SHOWING DEFENDANT'S MOTION FOR DIRECTED VERDICT AT CONCLUSION OF APPELLANT'S CASE IN CHIEF OVERRULED

Argument heard and Court overrules said motion. Jury returned to Jury box. Defendant's Counsel, Warren Buchanan, makes opening statement for defendant and then evidence introduced for defendant. There being insufficient time to conclude defendant's evidence, cause continued until June 26, 1963 at 9:30 o'clock A. M.

[fol. 127]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

ORDER BOOK ENTRY SHOWING DEFENDANT'S EVIDENCE IN CHIEF COMPLETED AND RESTS

AND

ORDER BOOK ENTRY SHOWING FILING OF DEFENDANT'S MOTION FOR COURT TO DIRECT JURY TO RETURN VERDICT FOR DEFENDANT AND DISCHARGE OF DEFENDANT AT CONCLUSION OF ALL EVIDENCE

And afterwards towit June 26, 1963, being the 69th Judicial day of the Adjourned April 1963 term of said court, before the Honorable Clarence G. Powell, Judge thereof, the following further proceedings were had herein towit:

Comes the State of Indiana, by Earl M. Dowd, its Prosecuting Attorney. Comes defendant, Ronald Richard Cichos, in person and by his counsel, Warren Buchanan and John

B. McFaddin. Comes Margaret Berrisford, Court Reporter. Comes the Jury heretofore impaneled to try this cause. Trial resumed and additional evidence in chief introduced for defendant. Defendant completes his evidence in chief and rests. State introduces rebuttal evidence and rests. Defendant introduces surrebuttal evidence and rests. Both parties rest. Defendant files motion for the Court to Direct Jury to Return Verdict for the defendant and for discharge of the defendant at conclusion of all the evidence in the case, which is as follows:

[fol. 128]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

Extended April Term, 1963

No. 7749

[Title omitted]

MOTION OF DEFENDANT FOR THE COURT TO DIRECT JURY TO RETURN VERDICT FOR THE DEFENDANT AND FOR DISCHARGE OF THE DEFENDANT AT CONCLUSION OF ALL EVIDENCE IN THE CASE—Filed June 26, 1963

Comes now the defendant, by his attorneys, Warren Buchanan and John B. McFaddin, at the conclusion of all the evidence in the case, and before argument and before the Court has instructed the jury and moves the Court to forthwith direct a verdict herein for the defendant and to discharge the defendant from custody, and tenders and offers an instruction for such purpose, for the following reasons and for each of said reasons, separately and severally considered, to-wit:

1. The prosecution has wholly failed to prove and establish by competent evidence beyond a reasonable doubt that

the offenses alleged and charged in the 2nd Amended Affidavit, or either of them, or any offense included therein, were committed as charged in said 2nd Amended Affidavit.

2. The prosecution has wholly failed to prove and estab- [fol. 129] lish by competent evidence beyond a reasonable doubt the corpus delicti of the offenses of Reckless Homicide or Involuntary Manslaughter, or either of them, as charged in the 2nd Amended Affidavit.

3. The competent evidence offered by the State and admitted by the Court is not sufficient to sustain a verdict of guilty.

4. There is not a sufficient amount of competent, admissible evidence in the record from which the jury can find that the State has proved the material allegations of either count of the 2nd Amended Affidavit beyond all reasonable doubt in accordance with Court's Preliminary Instructions Numbered 5, 7 and 8.

5. The defendant at the original trial of this cause was acquitted and, by implication, found not guilty of Involuntary Manslaughter, as charged in Count 11 of the 2nd Amended Affidavit. The defendant cannot be tried more than one time for the same offense. Therefore, in the present trial, the jury should be directed to return a verdict finding the defendant not guilty of the offense of Involuntary Manslaughter charged in Count 11 of the 2nd Amended Affidavit.

Wherefore, the defendant asks that the jury be forthwith directed to return a verdict herein finding the said defendant not guilty of the offenses charged in the 2nd Amended Affidavit, or of any lesser degree thereof, or of any offenses included therein, and that he be discharged.

Ronald Richard Cichos, Defendant, By: John B. [fol. 130] McFaddin, w b, Warren Buchanan, His Attorneys.

[File endorsement omitted]

[fol. 131]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

Extended April Term, 1963.

No. 7749

[Title omitted]

INSTRUCTION DIRECTING JURY TO RETURN VERDICT FOR DEFENDANT TENDERED WITH DEFENDANT'S WRITTEN MOTION FOR SUCH PURPOSE

Instruction No. A

Members of the jury you are directed to immediately and forth-with return a verdict finding the defendant not guilty of the offenses charged in the 2nd Amended Affidavit in this cause.

....., Judge, the Parke Circuit Court.

[fol. 132]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

Extended April Term, 1963

No. 7749

[Title omitted]

INSTRUCTION DIRECTING JURY TO RETURN VERDICT FOR DEFENDANT TENDERED WITH DEFENDANT'S WRITTEN MOTION FOR SUCH PURPOSE

Instruction No. B

Members of the jury you are directed to immediately and forth-with return a verdict finding the defendant not guilty

of the offense charged in Count 11 of the 2nd Amended Affidavit in this cause.

....., Judge, the Parke Circuit Court.

[fol. 133]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

ORDER BOOK ENTRY SHOWING DEFENDANT'S MOTION FOR DIRECTED VERDICT AT CONCLUSION OF ALL EVIDENCE OVER-RULED

Said motion submitted without argument. Court over-rules defendant's motion.

[fol. 230]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

RETURN OF VERDICT BY JURY

And afterwards towit June 28, 1963, being the 71st Judicial day of the Adjourned April 1963 term of said court, before the Honorable Clarence G. Powell, Judge thereof, the following further proceedings were had herein towit:

Now comes Frank Anderson, the Jury Bailiff, and reports to the Court that the Jury has requested that the Court re-read the instructions heretofore read to them and the Court now calls the Prosecuting Attorney, who appears; Warren Buchanan, attorney for the defendant, who appears; defendant appears in person; and was unable to reach defendant's counsel, John B. McFaddin, who appears later; and the Court now calls the jury to the jury box and re-reads the Preliminary Instructions given in this case and the general instructions given in this case. The jury retires to the Jury Room and later notifies the Jury Bailiff to inform the Court that it had reached a verdict and the Court notifies Earl M. Dowd, the Prosecuting Attorney and Warren Buchanan and John B.

McFaddin, counsel for the defendant, and said counsel and the State's Prosecuting Attorney being present and the defendant also being present, the Court directs the Bailiff to call the jury to the jury box. Jury appears and on being asked if they had reached a verdict, informs the Court they had and the foreman, Floyd E. Blacketer, informs the Court that a verdict had been reached and handed to the Court the verdict which was read and is as follows:

[fol. 231]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

April Term, 1963

Cause No. 7749

[Title omitted]

VERDICT OF JURY—Filed June 28, 1963

We, the jury, find the defendant guilty of Reckless Homicide as charged in Count One of the Affidavit and find his age to be 29 years.

Floyd E. Blacketer, Foreman.

[File endorsement omitted]

[fol. 232]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

ORDER BOOK ENTRY SHOWING DEFENDANT'S MOTION IN ARREST OF JUDGMENT FILED

Comes defendant, by counsel, and files verified motion in arrest of judgment, which is as follows:

[fol. 233]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

Extended April Term, 1963

Cause No. 7749

[Title omitted]

MOTION IN ARREST OF JUDGMENT—Filed June 28, 1963

Comes now Ronald Richard Cichos, defendant in the above-entitled cause of action by his attorneys of record, Warren Buchanan and John B. McFaddin, and as such defendant and before the State of Indiana has moved the Court for judgment on the verdict in this cause, and before judgment has been rendered in said cause, files this application in writing asking that no judgment be rendered on said verdict of the jury herein finding this defendant guilty of reckless homicide as charged in Count 1 of the second amended affidavit herein and finding his age to be 29 years and said defendant respectfully moves the Court that judgment in the above-entitled cause be arrested on the following grounds, to-wit:

(1) That the facts stated in Counts 1 and 2 of the second amended affidavit herein do not constitute a public offense under the laws of the State of Indiana.

(2) That the verdict of the jury returned in this cause on June 28, 1963, purported to find the defendant guilty of the offense of reckless homicide, as charged in Count 1 of the second amended affidavit herein, and that said verdict, by implication, found the said defendant not guilty and acquitted said defendant of the charge of involuntary [fol. 234] manslaughter as charged in Count 2 of said amended affidavit. That said verdict is contrary to law and that said verdict is fatally defective in that it purports to convict the defendant of one offense and then acquit him of another, although the offense of involuntary man-

slaughter, as charged in Count 2 of said second amended affidavit, possesses all of the elements factually and legally of the offense of reckless homicide as charged in Count 1 of said affidavit; the second amended affidavit, which was based on a single set of facts, was in two counts based on Burns' Statutes Section 47-2001 (a) and Burns' Statutes Section 10-3405; a conviction of reckless homicide cannot properly exist, either simultaneously or subsequently to an acquittal of involuntary manslaughter based on the same facts; accordingly, the inconsistency of the verdict herein is fatal and said verdict will not support a judgment and sentence based thereon; legal inconsistency in a verdict has the effect of making such a verdict a nullity and no judgment or conviction based thereon can be entered; the entry of a judgment or conviction on the verdict in this cause would violate the rules of collateral estoppel and double jeopardy; the verdict is one upon which no valid judgment can possibly be entered without being contrary to law.

(3) That the defendant intends to file a motion for new trial in this cause; that the present recognizance of the defendant in the amount of $4,000.00, as fixed by the Court, is adequate and that judgment should not be rendered and such present recognizance of said defendant should be [fol. 235] continued, until the defendant has had an opportunity to file a motion for new trial herein, and for the Court to consider said motion for new trial and enter an order with regard to the same.

Wherefore, The defendant prays that no judgment be rendered herein on the verdict of the jury returned this day and finding said defendant guilty of reckless homicide as charged in Count 1 of the second amended affidavit herein and finding his age to be 29 years; that judgment herein be arrested for a period of at least thirty (30) days following the date of the verdict of the jury herein in order

that the said defendant may have a proper opportunity to file his written motion for new trial herein.

Dated and filed in open court this 28th day of June, 1963.

Ronald Richard Cichos, Defendant, By: John B. McFaddin, Warren Buchanan, His Attorneys.

Certificate of Service (omitted in printing).

[fol. 246]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

ORDER BOOK ENTRY SHOWING FILING OF DEFENDANT'S MOTION FOR NEW TRIAL

And afterwards towit July 11, 1963, being the 82 Judicial day of the Adjourned April 1963 term of said court, before the Honorable Clarence G. Powell, Judge thereof, the following further proceedings were had herein towit:

Comes defendant, by his counsel, Warren Buchanan and John B. McFaddin, and files written motion for new trial, which is as follows:

[fol. 247]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

Extended April Term, 1963

Cause No. 7749

[Title omitted]

DEFENDANT'S MOTION FOR NEW TRIAL—Filed July 11, 1963

Comes now Ronald Richard Cichos, the defendant in the above-entitled cause by John B. McFaddin and Warren Buchanan, his attorneys, and moves the Court for a new trial thereof for the following reasons and causes, and each

[File endorsement omitted]

of said reasons and causes, separately and severally considered, to-wit:

1. Irregularities in the proceedings of the Court, or jury, and for orders of the Court and abuse of discretion by which the defendant was prevented from having a fair trial in this, to-wit:

The Court erred in over-ruling the defendant's motion to quash counts one (1) and two (2) of the second amended affidavit upon which the defendant was tried in this cause.

2. Irregularities in the proceedings of the Court, or jury, and for orders of the Court and abuse of discretion by which the defendant was prevented from having a fair trial in this, to-wit:

[fol. 248] The Court erred in sustaining the demurrer of the State of Indiana to the defendant's verified special plea of former jeopardy addressed to the charge against the defendant of the offense of involuntary manslaughter as set forth in the second count of the second amended affidavit upon which the defendant was tried in this cause.

3. Error of law occurring at the trial in this, to-wit:

The Court erred in over-ruling the defendant's objection to the admission into evidence of State's Exhibit 3. The basis for the defendant's original objection to State's Exhibit 3 was upon the ground and for the reason that the dead body of Mrs. Shella Barber and an empty shoe appeared in the photograph. The defendant objected to the admission in evidence of State's Exhibit 3 for the reason that the appearance of the dead body and the empty shoe in the photograph would only tend to inflame and prejudice the members of the jury without contributing anything toward showing the position of the Barber car and the defendant's car following the collision. The Court overruled the defendant's objection to the admission in evidence of State's Exhibit 3.

4. Error of law occurring at the trial in this, to-wit:

The Court erred in over-ruling and in refusing to sustain the defendant's motion that the part of the photograph marked State's Exhibit 3 showing the dead body of Mrs. Shella Barber and an empty shoe be covered with blank paper to be pasted over such parts of said photograph before said photograph was exhibited to the jury.

[fol. 249] The defendant's objection to State's Exhibit 3 and the defendant's motion with regard to the covering of the part of the photograph marked as State's Exhibit 3 showing the dead body of Mrs. Shella Barber and an empty shoe are as follows:

RUFUS C. FINNEY.

Direct examination.

By Earl M. Dowd:

Q. And State's Exhibit 3 for purposes of identification and ask you if you can identify that:

A. Yes I can, this picture was taken also looking west at the scene of the accident. It shows a terrific amount of damage done to—received by the '53 Plymouth. Also shows one of the subjects at the scene.

Attorney Dowd: At this time your Honor the State is asking that these Exhibits be introduced into evidence and displayed to the Jury.

Attorney McFaddin: Defense has no objection to the introduction of what has been marked State's Exhibits 1, and 2 and 5, 6, 7 and 8, but we do object to the introduction of 3 and 4 and would like to be heard out of the presence of the Jury Judge on my reasons.

Court: Jury excused for 10, 15 or 20 minutes.

Attorney McFaddin: Withdraw our objection to State's Exhibit 4.

Court: The Court will overrule objection of defendant to [fol. 250] Exhibit 3 and it will be admitted.

Jury excused until 1:00 o'clock.

Attorney Buchanan: The defendant, after his objection to the introduction into evidence of State's Exhibit No. 3 has been over-ruled, now moves the Court that the portion of the photograph indicated as Exhibit 3 showing the body of Mrs. Barber and an empty shoe be masked out of the photograph for the reason that the part of the photograph showing the body and the shoe would only tend to inflame the jury and arouse prejudice against the defendant and the part of the photograph showing the body and the empty shoe can be masked out of the photograph without affecting any part of the evidence in this cause. I think that's a reasonable request Judge, that the body be—just take a piece of paper and fasten over that with scotch tape and it would still show everything that the State has said that that should be introduced for.

Court: Well they say anything disclosed by this a witness could testify to, couldn't he testify to this position here of this car and this woman here in this position and it showed that she was dead later by determination of an inquest—I don't know how they determined she was dead, whether they determined that or not. That's one of the things they have got to prove, this woman was dead.

Attorney Buchanan: Witness has already testified that Mr. and Mrs. Barber were killed, without reference to that.

Court: Well they hold that cumulative evidence is not sufficient ground to exhibit, and also there are other things [fol. 251] that might be shown that was shown in one of these cases, that the witness hadn't testified to it disclosed in the photograph. Well, that's the ruling of the Court and we are ready to go ahead. The Court will overrule the objection of defendant to Exhibit 3 and we will admit the Exhibits numbered from 1 to 8 inclusive and they are to be passed to the Jury for inspection. I would submit them according to their numbers, No. 1 first and then on down the line."

5. Error of law occurring at the trial in this, to-wit:

The Court erred in permitting the State's witness, Hugh Thompson, on rebuttal, to answer the following question

put to him by the Prosecuting Attorney, as a witness for the State of Indiana, on rebuttal, over the objection of the defendant which question, preliminary question by defendant, objection, ruling of the Court, and answer are as follows:

"HUGH THOMPSON.

REBUTTAL EVIDENCE

Direct examination.

By Earl M. Dowd:

Q. I will ask you whether or not at that time Mr. Lowe did not tell you this or this in substance, that on that particular morning Ronald Cichos was drunk and intoxicated and had no business driving an automobile?

Attorney Buchanan: Just a minute Hugh. Your Honor could I ask the witness a Preliminary Question please.

Q. Mr. Thompson was Ronald Richard Cichos present at the time you had this conversation, this alleged conversa-
[fol. 252] tion, with Mr. Lowe?

A. No sir.

Attorney Buchanan: The defendant objects to the question your Honor for the reason that the question calls for what took place in an alleged conversation between the witness and a third party out of the presence of the defendant.

Court: I don't understand that impeachment that the conversation has got to be in the presence of the defendant. I don't think that's a requirement, just it goes to the particular testimony of that particular witness. I'll overrule the objection. You can answer.

Attorney Dowd: You may answer the question. Do you want it re-read to you?

Witness: Please.

Q. I will ask you whether or not at that time Mr. Lowe did not tell you this or this in substance, that on that par-

ticular morning Ronald Cichos was drunk and intoxicated and had no business driving an automobile?

A. That's right, in substance, yes.

Q. That was the substance of the conversation between you and Mr. Lowe?

A. That's right."

6. Error of law occurring at the trial in this, to-wit:

The Court erred in over-ruling defendant's motion, at the conclusion of evidence presented by the State of Indiana, and after the State of Indiana had rested its case, that the jury be forthwith directed to return a verdict herein [fol. 253] finding the said defendant not guilty of the offenses charged in the 2nd amended affidavit in this cause, and in refusing to give the jury an instruction then and there tendered to the Court by the defendant for such purpose, which said tendered instruction was as follows:

> Instruction Directing Jury to Return Verdict for Defendant Tendered With Defendant's Written Motion for Such Purpose.
>
> Instruction No. A
>
> Members of the jury you are directed to immediately and forthwith return a verdict finding the defendant not guilty of the offenses charged in the 2nd Amended Affidavit in this cause.
>
> ....., Judge, the Parke Circuit Court.

7. Error of law occurring at the trial in this, to-wit:

The Court erred in over-ruling defendant's motion, after the State of Indiana and the defendant had rested, and after the introduction of all of the evidence in this cause had been completed, and before argument of counsel, that the jury be forthwith directed to return a verdict herein finding the said defendant not guilty of the offenses charged in the 2nd amended affidavit in this cause, and in refusing to give to the jury an instruction then and there tendered

to the Court by the defendant for such purpose, which said instruction was as follows:

Instruction Directing Jury to Return Verdict for Defendant Tendered With Defendant's Written Motion for Such Purpose.

[fol. 254] Instruction No. B

Members of the Jury you are directed to immediately and forthwith return a verdict finding the defendant not guilty of the offense charged in Count II of the 2nd Amended Affidavit in this cause.

....., Judge, the Parke Circuit Court.

8. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 2 as requested and tendered by the defendant to which the defendant excepted.

9. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 8 as requested and tendered by the defendant to which the defendant excepted.

10. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 10 as requested and tendered by the defendant to which the defendant excepted.

11. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 13 as requested and tendered by the defendant to which the defendant excepted.

12. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 16 as requested and tendered by the defendant to which the defendant excepted.

[fol. 255] 13. Error of law occurring at the trial in this, to-wit:

That the court erred in refusing to give Instruction No. 17 as requested and tendered by the defendant to which the defendant excepted.

14. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 18 as requested and tendered by the defendant to which the defendant excepted.

15. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 19 as requested and tendered by the defendant to which the defendant excepted.

16. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 20 as requested and tendered by the defendant to which the defendant excepted.

17. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 22 as requested and tendered by the defendant to which the defendant excepted.

18. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 23 as requested and tendered by the defendant to which the defendant excepted.

19. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 24 as requested and tendered by the defendant to which the [fol. 256] defendant excepted.

20. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 25 as requested and tendered by the defendant to which the defendant excepted.

21. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 29 as requested and tendered by the defendant to which the defendant excepted.

22. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 32 as requested and tendered by the defendant to which the defendant excepted.

23. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 33 as requested and tendered by the defendant to which the defendant excepted.

24. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 34 as requested and tendered by the defendant to which the defendant excepted.

25. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 35 as requested and tendered by the defendant to which the defendant excepted.

26. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. [fol. 257] 36 as requested and tendered by the defendant to which the defendant excepted.

27. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 37 as requested and tendered by the defendant to which the defendant excepted.

28. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 38 as requested and tendered by the defendant to which the defendant excepted.

29. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 40 as requested and tendered by the defendant to which the defendant excepted.

30. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 46 as requested and tendered by the defendant to which the defendant excepted.

31. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 47 as requested and tendered by the defendant to which the defendant excepted.

32. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 48 as requested and tendered by the defendant to which the defendant excepted.

33. Error of law occurring at the trial in this, to-wit:

[fol. 258] That the Court erred in refusing to give Instruction No. 51 as requested and tendered by the defendant to which the defendant excepted.

34. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 52 as requested and tendered by the defendant to which the defendant excepted.

35. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 53 as requested and tendered by the defendant to which the defendant excepted.

36. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving over the written objections of the defendant, Instruction No. 2 as requested and

tendered by the Prosecuting Attorney for the 68th Judicial Circuit of Indiana.

37. Error of law occurring at the trial in this, to-wit:

That the court erred in giving over the written objections of the defendant, Instruction No. 6 as requested and tendered by the Prosecuting Attorney for the 68th Judicial Circuit of Indiana.

38. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving over the written objections of the defendant, Instruction No. 8 as requested and tendered by the Prosecuting Attorney for the 68th Judicial Circuit of Indiana.

39. Error of law occurring at the trial in this, to-wit:

[fol. 259] That the Court erred in giving over the written objections of the defendant, Instruction No. 15 as requested and tendered by the Prosecuting Attorney for the 68th Judicial Circuit of Indiana.

40. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving over the written objections of the defendant, Instruction No. 18 as requested and tendered by the Prosecuting Attorney for the 68th Judicial Circuit of Indiana.

41. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving over the written objections of the defendant, Instruction No. 19 as requested and tendered by the Prosecuting Attorney for the 68th Judicial Circuit of Indiana.

42. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving, over the written objections of the defendant, Court's Instruction No. 2 as tendered and given by the Court on its own motion.

43. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving, over the written objections of the defendant, Court's Instruction No. 6 as tendered and given by the Court on its own motion.

44. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving, over the written objections of the defendant, Court's Instruction No. 7 as tendered and given by the Court on its own motion.

45. Error of law occurring at the trial in this, to-wit:

[fol. 260] That the Court erred in giving, over the written objections of the defendant, Court's Instruction No. 8 as tendered and given by the Court on its own motion.

46. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving, over the written objections of the defendant, Court's Instruction No. 10 as tendered and given by the Court on its own motion.

47. That the verdict of the jury is contrary to law.

48. That the verdict of the jury is not sustained by sufficient evidence.

Ronald Richard Cichos, Defendant, By: John B. McFaddin, Warren Buchanan, His Attorneys.

[fol. 261]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

ORDER BOOK ENTRIES SHOWING DEFENDANT'S MOTION IN ARREST OF JUDGMENT

AND

MOTION FOR NEW TRIAL OVERRULED AND ORDER BOOK ENTRY SHOWING DEFENDANT SENTENCED

And afterwards towit July 16, 1963, being the 86th Judicial day of the Adjourned April 1963 term of said court, before the Honorable Clarence G. Powell, Judge thereof, the following further proceedings were had herein towit:

Hearing on motion in arrest is waived by defendant and State and the Court now overrules defendant's motion in arrest of judgment and also overrules his motion for a new trial.

Defendant is in Court and is called to the bench and asked if he had any reason why sentence should not be pronounced and he stated he had none and the Court fines him $100.00 and costs and sentences him to the custody of the Trustees of the Indiana Reformatory at Pendleton, Indiana for a period of not less than one (1) nor more than five (5) years. * * *

[fol. 267]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

COURT'S MEMORANDUM SHOWING FILING OF DEFENDANT'S PRAECIPE

And stating that he had filed a Praecipe in the Clerk's Office for a certified copy of the record in this cause, which is as follows:

[fol. 268]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

ADJOURNED APRIL TERM, 1963

No. 7749

[Title omitted]

PRAECIPE FOR APPEAL TO SUPREME COURT OF INDIANA—
Filed July 16, 1963

To the Clerk of the Parke Circuit Court, Parke County, Indiana.

Will you please make out and certify on appeal for use to the Supreme Court of Indiana, a full true and correct copy of the entire record in the above entitled cause, except that you will incorporate the original Bill of Exceptions containing the evidence instead of copy thereof.

July 16th, 1963.

Ronald Richard Cichos, Defendant, By: John B. McFaddin, His Attorney.

[File endorsement omitted]

Certificate of Service (omitted in printing).

[fol. 454]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

DEFENDANT'S MOTION FOR DIRECTED VERDICT AT CONCLUSION OF ALL EVIDENCE AND COURT'S RULING

Attorney Buchanan: Defendant rests on Surrebuttal and we would like to file a motion.

Court: Motion by defendant for a directed verdict and that's the conclusion of all the evidence in the case. The Court overrules the motion. You rest Mr. Dowd.

Attorney Dowd: The States Rests your Honor.

Attorney McFaddin: Defense Rests.

This was all the evidence given in this cause.

[fol. 455] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 456]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

Cause No. 7749

[Title omitted]

CERTIFICATE OF THE JUDGE OF THE PARKE CIRCUIT COURT TO BILL OF EXCEPTIONS NUMBER TWO, THAT BEING BILL OF EXCEPTIONS CONTAINING THE EVIDENCE

Be It Remembered, that on the 6th day of January 1964, the defendant, Ronald Richard Cichos, presented and tendered to the Undersigned, Clarence G. Powell, Judge of said Parke Circuit Court, this bill of exceptions, containing the evidence in said cause for settlement and signature, and prayed that the same might be signed, and made a part of the record in this cause; and now, having fully examined this bill of exceptions containing the evidence, the undersigned does now certify the same to be full, true, correct and complete.

And this bill of exceptions is now, here, on this, the 6th day of January, 1964, settled, approved, signed and ordered to be and constitute a part of the record of said cause, and the Clerk of said court is hereby ordered to file the same as a part of the record in said above entitled cause, and the same is now filed with said Clerk and made a part of the record herein.

In Witness Whereof, I have hereunto set my hand this 6th day of January, 1964.

Clarence G. Powell, Judge of the Parke Circuit Court.

[File endorsement omitted]

[fol. 457]

IN THE PARKE CIRCUIT COURT, STATE OF INDIANA

IN VACATION 1964

Cause No. 7749

[Title omitted]

ORDER BOOK ENTRY TO SHOW APPROVAL, SIGNATURE AND ORDER FOR FILING OF THE TWO BILLS OF EXCEPTIONS

Be It Remembered, that heretofore on the 16th day of July, 1963, the Court overruled the defendant's motion for a new trial herein, to which ruling of the Court the said defendant, at the time, objected and excepted.

And Now, within the time allowed for that purpose, the defendant presents to the Court his bills of exception, one containing a transcript of all the evidence in said cause and the other the objections and exceptions to certain instruments tendered by the State of Indiana and given by the Court and to certain instructions given by the Court of its own motion, and the Court having seen and examined said transcripts and being duly advised in the premises does now sign the same as a Bill of Exception containing all the evidence in said cause and the Bill of Exception containing the objections to the giving of certain instructions tendered by the State of Indiana and certain instructions given by the Court on its own motion in said cause and orders that the same be filed with the Clerk of this Court and made a part of the record in this cause.

[fol. 459] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 460]

IN THE SUPREME COURT OF INDIANA

Appeal From The Parke Circuit Court

Cause No. 30,482

RONALD RICHARD CICHOS,

Appellant,

vs.

THE STATE OF INDIANA,

Appellee.

APPELLANT'S ASSIGNMENT OF ERRORS

The Appellant, Ronald Richard Cichos, says there is manifest error in the judgment and proceedings, prejudicial to the Appellant, Ronald Richard Cichos, in this cause, to-wit:

1. The Court erred in overruling the Appellant's motion for a new trial.

Ronald Richard Cichos, Appellant, By: Warren Buchanan, John B. McFaddin, His Attorneys.

[fol. 461] Attorneys for Appellant: Warren Buchanan, John B. McFaddin, Rockville, Ind.

Attorneys for Appellee: John J. Dillon, Atty. Gen. of Indiana, and James Manahan, Deputy Atty. Gen., Indianapolis, Ind.

IN THE SUPREME COURT OF INDIANA

No. 30,482

RONALD R. CICHOS, Appellant,

v.

STATE OF INDIANA, Appellee.

Appeal from the Parke Circuit Court, Hon. Clarence G. Powell, J.

OPINION—July 6, 1965

Achor, Judge

Appellant was previously charged in two counts. (1) Involuntary Manslaughter, and (2) Reckless Homicide. He was convicted on the latter charge—the verdict was silent as to the charge of the first count. Said judgment was appealed to this court, which reversed the judgment with instructions to grant appellant a new trial.

Appellant was again charged with (1) Involuntary Manslaughter, and (2) Reckless Homicide, and the resultant verdict was the same as that which resulted from the first trial.

In this, his second appeal, appellant urges six propositions of law which will be considered in the order in which they are presented in appellant's brief.

[File endorsement omitted]

One: Appellant urges that the trial court committed reversible error by permitting the state to prosecute him a second time for either involuntary manslaughter or reckless homicide, for the reason that in the original trial the jury, by failing to make a finding as to the charge of involuntary manslaughter, impliedly had acquitted appellant on that charge, and further, since the factual circumstances involved in the charge for reckless homicide were the same infractions of the law as were involved in the count for involuntary manslaughter, the jury, therefore, having de-
[fol. 462] termined that appellant was not guilty of a crime involving these alleged acts, could not subject him a second time to a criminal charge involving the same infractions.

Admittedly there is substantial authority that silence as to one count of several counts of an indictment is equivalent to a verdict of not guilty on that count.

Smith v. *State* (1951), 229 Ind. 546, 99 N. E. 2d 417;
Ward v. *State* (1919), 188 Ind. 606, 125 N. E. 397;
Beaty v. *State* (1882), 82 Ind. 228;
Harvey v. *State* (1881), 80 Ind. 142;
Bryant v. *State* (1880), 72 Ind. 400;
Bonnell v. *State* (1878), 64 Ind. 498;
Weinzorpflin v. *State* (1884), 7 Blackf. (Ind.) 186;
Ewbanks, Indiana Criminal Law § 445, p. 282.

Also, the cases generally make no distinction as to whether the numerous counts are lesser included offenses, greater offenses, or merely different charges concerning the same transaction. In the leading case of *Weinzorpflin* v. *State, supra,* the doctrine of silence being equivalent to an acquittal was promulgated with reference to the common law doctrine that a jury could not be dismissed until a verdict was returned. That case, however, distinguishes its facts from a situation where the court could judicially know that the multiple counts were merely different charges of the same offenses.

The distinction drawn in *Weinzorpflin* v. *State, supra,* although supported by substantial logic, was not long ob-

served, and the axiom, silence means acquittal, soon came to be applied with no regard as to whether the count on which the verdict was silent was a greater or lesser included offense or a different charge for the same unlawful [fol. 463] transaction. See: *Beaty* v. *State, supra.* On the other hand, the logic of the principle which states silence is equal to an acquittal is perhaps made inappropriate to charges of these offenses, related to the same unlawful transaction, especially since this court judicially knows the trial court practice of telling the jury to return a verdict on only one of the charges in view of the limitation on penalty.

Rather than treat the silence of the jury in the involuntary manslaughter count in this case as an acquittal, the better result would seem to be to hold that the reckless homicide verdict encompassed the elements of involuntary manslaughter,[1] and that appellant was simply given the lesser penalty.

[fol. 464] *Two*: Under the state prohibition against double jeopardy [Constitution of Indiana Art. 1, §14], as

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[1] *Reckless Homicide.* "Any person who drives a vehicle with reckless disregard for the safety of others and thereby causes the death of another person shall be guilty of the offense of reckless homicide. Any person convicted of reckless homicide shall be punished by a fine of not less than one hunred dollars [$100] or more than one thousand dollars [$1,000], or by imprisonment in the state farm for a determinate period of not less than sixty [60] days and not more than six [6] months, or by both such fine and such imprisonment, or by a fine of not more than one thousand dollars [$1,000] and imprisonment in the state prison for an indeterminate period of not less than one [1] year or more than five [5] years."

Acts 1963, ch. 282, § 1, p. 458 (being Burns' Ind. Stat. Anno. § 47-2001(a) (1964 Supp.)).

Involuntary Manslaughter. "Whoever . . . kills any human . . . involuntarily in the commission of some unlawful act, is guilty of manslaughter, and on conviction shall be imprisoned not less than two [2] years nor more than twenty-one [21] years."

Acts 1941, ch. 148, § 2, p. 447 (being Burns' Ind. Stat. Anno. § 10-3405 (1956 Repl.)).

interpreted by the courts, the fact situation here involved does not present a case of double jeopardy.

State v. *Balsley* (1902), 159 Ind. 395, 65 N. E. 185;
Patterson v. *State* (1880), 70 Ind. 341;
Veatch v. *State* (1878), 60 Ind. 291;
Mills v. *State* (1875), 52 Ind. 187;
Ex Parte Bradley (1874), 48 Ind. 548;
Joy v. *State* (1886), 14 Ind. 139;
Weinzorpflin v. *State, supra;*
Morris v. *State* (1819), 1 Blackf. (Ind.) 37; accord
State ex rel. Lopez v. *Killigrew* (1931), 202 Ind. 397, 174 N. E. 808.

The Balsley case, *supra,* is substantially similar to the present controversy. In that case, appellee was tried on an indictment of two counts. One charged embezzlement and the other larceny. The jury verdict found appellee guilty of larceny but was silent as to the embezzlement count. Subsequently the larceny conviction was reversed on appeal and a new trial granted. Appellee, charged again with both larceny and embezzlement, filed a plea of abatement as to the embezzlement count claiming former jeopardy. A demurrer to the plea was overruled, but on appeal, this court reversed the overruling of the demurrer with a singularly appropriate discussion of double jeopardy. This court at page 397 stated:

> "The rights of the defendant and the State upon a new trial are clearly defined by statute: 'A new trial is a re-examination of the issues in the same court. The granting of a new trial places the parties in the same position as if no trial had been had; the former verdict cannot be used or referred to, either in the evidence or argument.' §§ 1909, 1910, Burns 1901 [now Burns' Ind. Stat. Anno. §§ 9-1901, 9-1902 (1956 Repl.)]. [fol. 465] "It is entirely clear that when the appellee asked for and obtained a new trial of the issues in his case, the results of the previous trial were wholly

vacated. He could not, under the indictment, take a new trial as to the issue upon one count, and not upon the other. If he obtained a new trial, he was bound to take it upon the terms and conditions of the statute, and one of those conditions was that 'the parties should be placed in the same position as if no trial had been had.' This point has been decided in many cases in this State, and must be considered as settled." [Citing cases.]

Three: Appellant finally contends that retrial under both counts of the indictment constituted double jeopardy as prohibited by the Fifth Amendment and the due process clause of the Fourteenth Amendment to the U. S. Constitution.

Appellant asserts that, despite the established Indiana law on this issue, a change in Indiana law is compelled by *Green* v. *United States* (1957), 355 U. S. 184, 2 L. Ed. 2d 199. However, among other facts which must be considered in relation to this assertion is the fact that the Green case was a federal case and therefore the rule enunciated arose under the U. S. Supreme Court's supervisory power over federal courts. The Green case involved a retrial on a murder charge, and resulted in a verdict of guilty of first degree murder, after a prior trial which had resulted in a second degree murder conviction had been reversed on appeal. Applying the Fifth Amendment double jeopardy provision, the Supreme Court held that a conviction of a lesser included offense amounted to an acquittal of the greater offense. Consequently, they reasoned that, on retrial, the accused could be tried for no greater charge than that for which he was originally convicted.

Aside from the obvious fact that the Green case, *supra*, involved the application of federal law and federal standards, there is the distinction concerning the character of the charges twice in issue. The offenses here involved are statutorily treated more as one offense with different penalties rather than viewing reckless homicide as an included [fol. 466] offense in involuntary manslaughter.

Since the elements of both counts are almost identical, it is recognized that a verdict of guilty of reckless homicide does not logically exclude the possibility of such a verdict on the charge of involuntary manslaughter for constitutional reasons as would be the case when a conviction is had on a lesser included offense. See Burns' Ind. Stat. Anno. §47-2002 (1956 Repl.).

When dealing with such interconnected offenses it is almost futile to attempt to sort out error and reverse a case only as to those errors which affected the defendant. Recognizing this futility, this state has accepted the position adopted by a substantial number of states, that when a defendant initiates an appeal asking for a new trial and the appeal discloses error, the original trial is treated as a total nullity, leaving the parties as they were prior to the proceeding tainted with error. Burns' Ind. Stat. Anno. § 9-1902 (1956 Repl.). Compare: *Green* v. *United States, supra,* 355 U. S. 184, 216 n. 4; 2 L. Ed. 2d 199, 220 n. 4 (dissenting opinion).

The protection against double jeopardy has never specifically been incorporated within the scope of the due process clause of the 14th Amendment, *supra,* by the Supreme Court.[2] Arguable, the double jeopardy provision is not necessarily a hallmark of either system, and it is reasonable to assume that some limitation on the total incorporation of the Fifth Amendment within the due process clause of the 14th Amendment may still exist.

[fol. 467] In view of the diverse reasoning by many of the states concerning double jeopardy in situations similar to the instant case, it does not appear that the federal standard of double jeopardy in *Green* v. *United States, supra,* can be deemed so fundamental a concept of ordered liberty as to compel a total revision of state interpretations of the

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[2] The broad language in Malloy v. Hogan (1964), —— U. S. ——, 12 L. Ed. 2d 653, indicates a future possibility of such incorporation. See also: Hoag v. State of New Jersey (1958), 356 U. S. 464, 2 L. Ed. 2d 913 [five to three decision by Harlan, J.; Warren, C. J., Douglas and Black JJ. dissent].

doctrine, which interpretations of their own constitutions are primarily the prerogative of the states.

Judgment sustained.

Jackson, C. J. and Landis, J. concur in result.
Arterburn and Myers, JJ. concur.

[fol. 468] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 469]

IN THE SUPREME COURT OF INDIANA

APPEAL FROM THE PARKE CIRCUIT COURT

Cause No. 30,482

[Title omitted]

APPELLANT'S PETITION FOR REHEARING—
Filed July 14, 1965

The appellant in the above-entitled cause prays the Court to grant a rehearing in said cause; and to that end the appellant respectfully shows to the Court that it erred in the following respects, that is to say:

1. In its written opinion upon the decision of said cause, the Supreme Court of Indiana erred in that said Court failed to comply with the requirements of Article 7, Section 5, of the Constitution of the State of Indiana by failing in said written opinion to give a statement in writing, and the decision of the Court herein, of each question arising in the record of such case, in the following particulars, to wit:

A. Specifications 3 and 4 of the Appellant's Motion For New Trial are a part of the record of this case; the error assigned on this appeal is that the trial Court erred in

[File endorsement omitted]

over-ruling the Appellant's Motion For New Trial; Specifications 3 and 4 of the Appellant's Motion For New Trial were included in the Appellant's Brief On The Assignment of Errors as Point 1 of Proposition II thereof; the written opinion of the Supreme Court of Indiana did not give the decision of the Court therein.

B. Specification 5 of the Appellant's Motion For New Trial is a part of the record of this case; the Assignment [fol. 470] of Errors on this appeal is that the trial Court erred in over-ruling the Appellant's Motion For New Trial; Specification 5 of the Appellant's Motion For New Trial was included in the Appellant's Brief on the Assignment of Errors as Point 2 of Proposition II thereof; the written opinion of the Supreme Court of Indiana did not give the decision of the Court therein.

C. Specifications 12, 13, 15, 16, 18, 19, 20, 23, 24 and 35 of the Appellant's Motion For New Trial are a part of the record of this case; the Assignment of Errors on this appeal is that the trial Court erred in over-ruling the Appellant's Motion For New Trial; these specifications were included in the Appellant's Brief on the Assignment of Errors as Point 1 of Proposition III thereof; the written opinion of the Supreme Court of Indiana did not give the decision of the Court therein.

D. Specification 42 of the Appellant's Motion For New Trial is a part of the record of this case; the Assignment of Errors on the appeal of this cause is that the trial Court erred in over-ruling the Appellant's Motion For New Trial; this specification was included in the Appellant's Brief on the Assignment of Errors as Point 2, Proposition III thereof; the written opinion of the Supreme Court of Indiana did not give the decision of the Court therein.

E. Specification 47 of the Appellant's Motion For New Trial is a part of the record of this case; the Assignment of Errors on the appeal of this cause is that the trial Court

erred in over-ruling the Appellant's Motion For New Trial; this specification was included in the Appellant's Brief on the Assignment of Errors as Point 1 of Proposition IV thereof; the written opinion of the Supreme Court of Indiana did not give the decision of the Court therein.

2. The Supreme Court of Indiana erred in holding in [fol. 471] its written opinion upon the decision of this case that it was not error for the trial Court to sustain the demurrer of the appellee to the Appellant's Verified Special Plea of Former Jeopardy for the reasons specified at Point 1 of Proposition I of the Appellant's Brief on the Assignment of Errors on the appeal of this cause.

Respectfully submitted,

Warren Buchanan, John B. McFaddin, Appellant's Attorneys.

July 14th, 1965

[fol. 472] Acknowledgments of service (omitted in printing).

[fol. 474] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 475]

IN THE SUPREME COURT OF INDIANA

No. 30,482

[208 N. E. 2d 685]

RONALD RICHARD CICHOS, Appellant,

v.

THE STATE OF INDIANA, Appellee.

OPINION ON PETITION FOR REHEARING—
Filed October 1, 1965

Achor, Judge

Appellant has filed a petition for rehearing in which he asserts that this court, in its opinion as written, erred in two particulars.

First: That this court failed to comply with the requirements of Art. 7, § 5 of the Indiana Constitution by failing to "give a statement in writing of each question arising in the record and the decision of the court thereon." It is not that this court has presumed to disregard this constitutional provision, but since the provision is merely directive and does not involve any substantive rights of the litigants involved, we have given it a reasonable construction consistent with the obviously intended purpose thereof. Accordingly we have limited our discussion to the principal contentions in the case which, incidentally, were the issues discussed in oral argument. We intentionally omitted from our discussion those "questions arising in the record" which seemed frivolous, were not supported by substantial argument in the briefs or were so patently contrary to the well-

[File endorsement omitted]

established law of the state since a discussion thereof would merely constitute an unjustifiable encumbrance of the reported decisions of the state without making any contribution to the general body of the law.

[fol. 476] Strong precedent has been established supporting the position that this constitutional provision is to be given reasonable rather than a literal construction. As stated by this court in *State ex rel. Sluss* v. *Appellate Court of Indiana* (1938), 214 Ind. 686, at 691-692, 17 N. E. 2d 824:

> "The constitutional provision quoted above [Art. 7, § 5] must have, however, a reasonable interpretation as well as a practical application. It is not to be presumed that the framers of that document intended that this court should be required to exhaust every subject that might be raised on an appeal, without regard to its importance in the determination of the cause.
>
> "In the case of *Willets* v. *Ridgway* (1857), 9 Ind. 367, 369, 370, Perkins, J., speaking for this court, said:
>
> 'It is true that the constitution, by an unwise provision, requires that this Court shall give a written opinion upon every point arising in the record of every case—a provision which, if literally followed, tends to fill our Reports with repetitions of decisions upon settled, as well as frivolous, points and often introduce into them, in the great press of business, premature and not well considered opinions, upon points only slightly argued; yet it is a provision not to be disregarded, though merely directory, like that requiring the legislature to use good *English*. But though the provision is not to be disregarded, *it is to be observed according to some construction, and should receive such a one as to obviate its inconvenience and objectionable character,* as far as consistently can be done.'" [Our emphasis.]

Furthermore, in a more recent case, when confronted with circumstances very similar to those existing in the present case, this court in *Appelby* v. *State* (1943), 221 Ind.

544, at pp. 549-550, 48 N. E. 2d 646 [reh. den. 49 N. E. 2d 533], stated:

> "The appellant's motion for a new trial occupies forty-five (45) of the six hundred sixty-eight (668) pages of their printed brief. Sixty-six (66) separate and distinct legal propositions are presented for our determination. We cannot bring ourselves to believe that the framers of our State Constitution had any such situation in mind when they enjoined upon us the obligation to 'give a statement in writing of each question arising in the record' (Article 7, Section 5), or when [fol. 477] they imposed upon the General Assembly the duty to provide for the 'speedy publication of the decisions' of this court (Article 7, Section 6). At the risk of being charged with failing to meet our responsibilities, *we feel obliged to limit our consideration of this case to what appear to be the principal contentions.* We have pointed out in the past that one prejudicial error clearly presented is enough to accomplish a reversal by this court. Weer v. State (1941), 219 Ind. 217, 36 N. E. 2d 787, 37 N. E. 2d 537." [Our italics.]

In other instances this court has applied the rule of reason to the above constitutional directive by providing that the court need not give a statement in writing of each question arising in the record, unless the parties have filed briefs and therein presented substantial argument regarding the issue so as to aid the court in making its decision regarding the questions presented by the record in such case. Furthermore, as above noted we have held that in reversing a case we need only discuss a single issue arising in the case which sustains the decision of this court.

In this case we have limited our consideration to those issues which we considered to be substantial questions and this we have endeavored to do in a comprehensive manner.

To demonstrate our reason for not discussing the other many specifications assigned as error, we make the following comment with regard to a few of such specifications,

which are illustrative of those asserted in appellant's petition for rehearing. Appellant's Proposition II, Point 1, urges that the trial court committed prejudical error by permitting State's Exhibit No. 3 to be admitted in evidence. Appellant claims that this exhibit, which was a photograph of one of the automobiles involved in the collision, was erroneously admitted because the body of one of the decedents was hanging from the wreckage and therefore the exhibit was calculated only to inflame the jury and served no other purpose. In support of his contention, appellant [fol. 478] cites the case of *Kiefer* v. *State* (1958), 239 Ind. 103, 153 N. E. 2d 899. However, examination of that case reveals that it does not support appellant's contention but, rather, justifies the admission of the evidence since the picture was an unaltered part of the res gestae of the case.

Appellant's Proposition II, Point 2, urges that the trial court committed error in permitting the state's witness to describe a conversation which he had with a witness for the defense shortly after the accident and out of the appellant's presence. Appellant claims error with regard to the admission of such evidence notwithstanding the fact that said testimony was admitted explicitly for the purpose of impeaching the defense witness, pursuant to the foundation which was laid in the cross-examination of said witness. The alleged error is contradicted by the well established law of this state as it has existed for 145 years.

In the early case of *Shields* v. *Cunningham* (1820), 1 Blackf. 86, at p. 87, this court stated:

> "We consider this to be the correct doctrine: Where a witness has, at other times and places, made statements repugnant or contradictory to those delivered in Court, and relative to facts material to the issue, the adverse party has a right to prove that circumstance in order to discredit the witness, or diminish the weight of his testimony; . . ."

The credibility of a witness, party, or accused may be attacked by showing that at another time and place he made

an oral or written statement inconsistent or contradictory to his testimony. See: *Pollard* v. *State* (1950), 229 Ind. 62, 94 N. E. 2d 912. See also: Wigmore on Evidence § 884, p. 376.

In the present case other specifications involved numerous instructions tendered by the appellant on the subject of [fol. 479] mere negligence as related to the charge of involuntary manslaughter or reckless homicide. The court's own instructions adequately covered this subject, and it was not therefore necessary for the court to read all of the appellant's array of instructions which would have, if given, had the effect of over-emphasizing the subject of "mere negligence" as an element in the case.

Likewise, appellant complains that the court did not give numerous instructions on the subject of reasonable doubt. This subject was also adequately presented by the court's own instructions. In fact, one of appellant's instructions, which the court refused to give, was given verbatim by the court as one of his own instructions. The absence of any merit to these specifications is so patent that no discussion seemed necessary.

Furthermore, appellant's Proposition II, Point 2, urges that the trial court erred in giving its instruction No. 2. True, appellant has engaged in a lengthy dissertation in his brief regarding this instruction. Although the instruction is subject to some rhetorical weakness, we cannot say that it was legally incorrect or that the jury was misled thereby. As demonstrated in appellee's brief, this instruction is supported by the case law of the state, and appellant has not favored us with a reply brief which refutes the conclusiveness of this authority.

As previously stated, the above specifications of error were not previously considered by this court in its opinion but were omitted because they were patently without merit, and although the constitution provides that the court "give a statement in writing of *each question* arising in the record" of such case, we are of the opinion that the law is so [fol. 480] firmly established with regard to the specifica-

tions of error asserted by appellant that there is, in reality, no substantial question with regard to such specifications and, therefore, that within a reasonable construction of the constitutional directive it was unnecessary that the court encumber the opinion with a discussion of this voluminous subject matter.

Secondly: Appellant reasserts that the verdict against him is void for the reason that the implied finding of not guilty in the prior trial with respect to the charge of involuntary manslaughter requires the conclusion that appellant was also not guilty of reckless homicide, both of which offenses involved the same acts on his part. This issue was fully considered, and we believe correctly so, in the opinion as written.

Rehearing denied.

Arterburn & Myers, JJ. concur.

Jackson, C. J. & Landis, J. concur in the result.

[fol. 481] Clerk's Certificate to foregoing paper (omitted in printing.)

[fol. 483]

SUPREME COURT OF THE UNITED STATES

No. 850—October Term, 1965

RONALD R. CICHOS, Petitioner,

v.

INDIANA.

ORDER ALLOWING CERTIORARI—April 4, 1966

The petition herein for a writ of certiorari to the Supreme Court of the State of Indiana is granted and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

October Term, 1965

No. [redacted] 43

RONALD R. CICHOS,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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IN THE

Supreme Court of the United States

October Term, 1965

No. ———

RONALD R. CICHOS,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Petitioner, Ronald R. Cichos, prays that a writ of certiorari issue to review the judgments of the Supreme Court of Indiana entered in the above case on July 6, 1965, and October 1, 1965.

OPINIONS BELOW

The opinion of the Supreme Court of Indiana is reported at 208 N. E. 2d 685, and is as yet unreported in the official Indiana Reports. The opinion on rehearing, also officially unreported, is found in 210 N. E. 2d 863. Such opinions are appended hereto.

JURISDICTION

The judgment of the Supreme Court of Indiana was made and entered on July 6, 1965. A copy thereof is appended hereto at the Appendix pp. 1). The petition for re-hearing was denied with an opinion on October 1, 1965. A copy of such is appended hereto at Appendix pp. 8). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

The instant case presents the following question:

1. Is the Constitutional right against double jeopardy guaranteed by the Fifth Amendment of such basic characteristic in the law so as to be immune from statute encroachment under the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth and Fourteenth Amendments to the Constitution of the United States involved in this appeal and Burns Indiana Statutes Ann. Sec. 9-1901, 9-1902 are set forth in the Appendix hereto at pp. 14-15. The statutes under which Petitioner was charged, Burns Ind. Stat. Ann. Sec. 47-2001(a) and Sec. 10-3405 are also set forth in the Appendix at p. 14-15.

STATEMENT

This criminal action was brought against Petitioner upon a second amended affidavit, charging the offenses of involuntary manslaughter, Burns Ind. Stat. Ann. Sec. 10-3405 and reckless homicide, Burns Ind. Stat. Ann. Sec. 47-2001 (a). The cause was tried by jury and a verdict of guilty returned as to reckless homicide. The jury was silent as to a verdict on the charge of involuntary man-

slaughter. Petitioner successfully appealed his conviction to the Indiana Supreme Court and the cause was reversed and a new trial ordered. At the second trial Petitioner was not only recharged with the crime of reckless homicide, in Count 1 but also again charged with the crime of involuntary manslaughter in Count 2. (R. p. 23-25)

Petitioner filed a special plea of former jeopardy under the Indiana and the United States Constitution addressed to Count 2, the pertinent parts of which are as follows:

> "Comes now the defendant, Ronald Richard Cichos, by his counsel, Warren Buchanan and John B. McFaddin, and for an additional special plea herein, alleges and says:
>
> "1. That on November 6, 1958, a second amended affidavit in this cause was filed in the Parke Circuit Court; that in said second amended affidavit this defendant was charged in two counts with the statutory offenses of reckless homicide, by count 1 thereof, and involuntary manslaughter, by count 2 of said second amended affidavit; that a bench warrant was issued by the Parke Circuit Court for the arrest of said defendant on said charges; that this defendant was thereupon arrested and held to answer to said charges; that a copy of the second amended affidavit herein charging this defendant with such offenses, certified as true and correct by the Clerk of this Court, is attached hereto, made a part hereof and marked Exhibit "A".
>
> "2. That by its terms, said second amended affidavit charged that this defendant on September 28, 1958, in Parke County, Indiana, commited the offenses of reckless homicide and involuntary manslaughter by then and there, unlawfully and feloniously, operating a motor vehicle upon and along a high way at and in the County of Parke, in the State of Indiana, while under the influence of intoxicating liquor, and that the said defendant then and there drove and operated his said automobile into and against an automobile

then and there driven and operated on said highway and in and on which one Frank Glen Barber and Shella Mae Barber were then and there riding and that the said Frank Barber and Shella Mae Barber were injured and wounded as a result of such collision and that they died as a result thereof on September 28, 1958.

"3. That the defendant was arraigned in the Parke Circuit Court, before the judge thereof, on *November 24, 1958,* and entered a plea of not guilty to the charges of reckless homicide and involuntary manslaughter as contained in said second amended affidavit.

"4. That during the months of November and December, 1959, this cause was tried in the Parke Circuit Court, and that the jury, at the trial of said cause, returned a verdict finding the defendant guilty of reckless homicide, as charged in said second amended affidavit; that the jury, at the trial of said cause, did not return a verdict finding the defendant guilty of involuntary manslaughter, as charged in count 2 of the second amended affidavit herein; that the Court rendered judgment of conviction and sentence on the verdict in this cause on February 16, 1960; that the defendant filed a motion for a new trial in said cause, and that such motion was over-ruled by the Court; that on August 12, 1960, and within the time granted by the Supreme Court of Indiana for such purpose, the defendant filed a transcript of the record and assignment of errors on an appeal of said conviction to said Supreme Court of Indiana; that on July 2, 1962, the Supreme Court of Indiana reversed the judgment of conviction of the defendant and this cause was remanded to this Court with instructions to sustain defendant's motion for new trial; that this cause is now assigned for re-trial in this Court for June 13, 1963; that a copy of the verdict returned by the jury herein finding the defendant guilty only of the offense of reckless homicide, certified as true and correct by the Clerk of this Court, is attached hereto, made a part hereof and marked Exhibit "B".

"5. That the defendant is now charged with the Statutory offenses of reckless homicide and involuntary manslaughter, as charged in counts 1 and 2, respectively, of the second amended affidavit herein; that the jury in the original trial of this cause, by failing to return a verdict as to the second count of the second amended affidavit herein, by implication, acquitted the said defendant of the charge of involuntary manslaughter.

"6. That the prior prosecution and acquittal of the defendant on the charge of involuntary manslaughter would now bar any further prosecution of said defendant based upon the same crime.

"7. That the facts necessary to convict the defendant on count 2 of the second amended affidavit now pending in this Court were adjudicated by the failure of the jury at the prior trial of the return a verdict on said count, thus acquitting said defendant of said crime; that the defendant cannot be placed in jeopardy, the second time, for the same offense; that prosecution to a final judgment of the offense in the prior trial of the same is a bar to his prosecution as to the second count of the second amended affidavit now pending in this Court.

"WHEREFORE, the Defendant prays that the charge of involuntary manslaughter as set forth in the second count of the second amended affidavit now pending against him be dismissed.

RONALD RICHARD CICHOS, Defendant

BY: Warren Buchanan
John B. McFaddin (w a)
His Attorneys

STATE OF MEXICO }
} SS:
COUNTY OF QUAY }

RONALD RICHARD CICHOS, after being first duly sworn upon his oath, says:

That he is the defendant in the above entitled cause of action and that the facts stated in the foregoing VERIFIED SPECIAL PLEA OF FORMER JEOPARDY are true in substance and in fact.

Ronald Richard Cichos

(Ronald Richard Cichos)

SUBSCRIBED and SWORN to before me this 31 day of May, 1963.

Opal Skelton

(SEAL) NOTARY PUBLIC

My Commission expires:

Dec. 29, 1964 (R 83-87)

The trial Court sustained a demurrer to this special plea. (R. p. 99) Petitioner moved for directed verdicts upon this count because of former jeopardy both at the conclusion of the State's evidence and at the conclusion of all of the evidence. The pertinent parts here are as follows:

"Comes now the defendant, by his attorneys, Warren Buchanan and John B. McFaddin, at the conclusion of the prosecution's case in chief and after the prosecution has rested and before the introduction of evidence in support of the defendant's defense and moves the Court to forthwith direct a verdict herein for the defendant and to discharge the defendant from custody, and tenders and offers an instruction for such purpose, for the following reasons and for each of said reasons, separately and severally considered, to-wit:

• • • • •

"5. The defendant at the original trial of this case was acquitted and, by implication, found not guilty of involuntary manslaughter, as charged in Count II of the 2nd Amended Affidavit. The defendant cannot be tried more than one time for the same offense.

> Therefore, in the present trial, the jury should be directed to return a verdict finding the defendant not guilty of the offense of Involuntary Manslaughter charged in Count II of the 2nd Amended Affidavit."
>
> (R. 121-122)
>
> • • • • •

and

> "Comes now the defendant, by his attorneys, Warren Buchanan and John B. McFaddin, at the conclusion of all the evidence in the case, and before argument and before the Court has instructed the jury and moves the Court to forthwith direct a verdict herein for the defendant and to discharge the defendant from custody, and tenders and offers an instruction for such purpose, for the following reasons and for each of said reasons, separately and severally considered, to-wit:
>
> • • • • •
>
> "The defendant at the original trial of this cause was acquitted and, by implication, found not guilty of Involuntary Manslaughter, as charged in Count II of the 2nd Amended Affidavit. The defendant cannot be tried more than one time for the same offense. Therefore, in the present trial, the jury should be directed to return a verdict finding the defendant not guilty of the offense of Involuntary Manslaughter charged in Count II of the 2nd Amended Affidavit."
>
> (R. 128-129)

Both were overruled. Verdict was returned finding defendant guilty on Count 1 and a Motion in Arrest of Judgment, again presenting the question, was filed by Petitioner. (R. p. 233-235) Again such was overruled. Again, Petitioner was found guilty of reckless homicide. His Motion for New Trial promptly filed was overruled. The part of such Motion addressed to this question is as follows:

"2. Irregularities in the proceedings of the Court, or jury, and orders of the Court and abuse of discretion by which the defendant was prevented from having a fair trail in this, to-wit:

"The Court erred in sustaining the demurrer of the State of Indiana to the defendant's verified special plea of former jeopardy addressed to the charge against the defendant of the offense of involuntary manslaughter as set forth in the second count of the second amended affidavit upon which the defendant was tried in this cause."

(R. 247, par. 2)

* * * * *

"6. Error of law occurring at the trial in this, to-wit: The Court erred in over-ruling defendant's motion, at the conclusion of evidence presented by the State of Indiana, and after the State of Indiana had rested its case, that the jury be forthwith directed to return a verdict herein finding the said defendant not guilty of the offenses charged in the 2nd amended affidavit in this cause, and in refusing to give the jury an instruction then and there tendered to the Court by the defendant for such purpose, which said tendered instruction was as follows:

INSTRUCTION DIRECTING JURY TO RETURN VERDICT FOR DEFENDANT TENDERED WITH DEFENDANT'S WRITTEN MOTION FOR SUCH PURPOSE

Instruction No. 4

Members of the jury you are directed to immediately and forthwith return a verdict finding the defendant not guilty of the offenses charged in the 2nd Amended Affidavit in this cause.

JUDGE, THE PARKE CIRCUIT COURT

"7. Error of law occurring at the trial in this, to-wit: The Court erred in over-ruling defendant's motion, after the State of Indiana and the defendant had rested, and after the introduction of all of the evidence in this cause had been completed, and before argument of counsel, that the jury be forthwith directed to return a verdict herein finding the said defendant not guilty of the offenses charged in the 2nd amended affidavit in this cause, and in refusing to give the jury an instruction then and there tendered to the Court by the defendant for such purpose, which said instruction was as follows:

INSTRUCTION DIRECTING JURY TO RETURN VERDICT FOR DEFENDANT TENDERED WITH DEFENDANT'S WRITTEN MOTION FOR SUCH PURPOSE

Instruction No. B

Members of the jury you are directed to immediately and forthwith return a verdict finding the defendant not guilty of the offense charged in Count II of the 2nd Amended Affidavit in this cause.

JUDGE, THE PARKE CIRCUIT COURT

(R. 252, par. 6 & 7)

On appeal to the Supreme Court of Indiana Petitioner assigned as error the overruling of his motion for new trial and the Court (R. p. 1) deciding the case on its merits, held that former jeopardy although existing in this case had been waived by Petitioner's first appeal and that a second trial even as to the involuntary manslaughter was permissible without violation of the double jeopardy provisions of the Indiana Constitution because of such waiver. The Supreme Court of Indiana further held that no Federal question under the Fourteenth Amendment of the

Constitution of the United States was involved and no protection under that Amendment afforded to state action regarding double jeopardy. Upon re-hearing, the Indiana Supreme Court affirmed its earlier holding. Its language concerning the Federal question under the Fourteenth Amendment reads as follows:

> "*Three*: Appellant finally contends that retrial under both counts of the indictment constituted double jeopardy as prohibited by the Fifth Amendment and the due process clause of the Fourteenth Amendment to the U. S. Constitution.
>
> "Appellant asserts that, despite the established Indiana law on this issue, a change in Indiana Law is compelled by *Green v. United States* (1957), 355 U. S. 184, 2 L. Ed. 2d 199. However, among other facts which must be considered in relation to this assertion is the fact that the Green case was a federal case and therefore the rule enunciated arose under the U. S. Supreme Court's supervisory power over federal courts. The Green case involved a retrial on a murder charge, and resulted in a verdict of guilty of first degree murder, after a prior trial which had resulted in a second degree murder conviction had been reversed on appeal. Applying the Fifth Amendment double jeopardy provision, the Supreme Court held that a conviction of a lesser included offense amounted to an acquittal of the greater offense. Consequently, they reasoned that, on retrial, the accused could be tried for no greater charge than that for which he was originally convicted.
>
> "Aside from the obvious fact that the Green case, *supra,* involved the application of federal law and federal standards, there is the distinction concerning the character of the charges twice in issue. The offenses here involved are statutorily treated more as one offense with different penalties rather than viewing reckless homicide as an included offense in involuntary manslaughter.

"Since the elements of both counts are almost identical, it is recognized that a verdict of guilty of reckless homicide does not logically exclude the possibility of such a verdict on the charge of involuntary manslaughter for constitutional reasons as would be the case when a conviction is had on a lesser included offense. See Burns Ind. Stat. Anno. Sec. 47-2002 (1956 Repl.)

"When dealing with such interconnected offenses it is almost futile to attempt to sort out error and reverse a case only as to those errors which affected the defendant. Recognizing this futility, this state has accepted the position adopted by a substantial number of states, that when a defendant initiates an appeal asking for a new trial and the appeal disclosed error, the original trial is treated as a total nullity, leaving the parties as they were prior to the proceeding tainted with error. Burns Ind. Stat. Anno. Sec. 9-1902 (1956 Repl.) Compare: *Green v. United States, supra,* 355 U. S. 184, 216 n. 4; 2 L. Ed. 2d 199, 220 n. 4 (dissenting opinion).

"The protection against double jeopardy has never specifically been incorporated within the scope of the due process clause of the 14th Amendment, supra, by the Supreme Court. Arguable, double jeopardy provision is not necessarily a hallmark of either system, and it is reasonable to assume that some limitation on the total incorporation of the Fifth Amendment within the due process clause of the 14th Amendment may still exist.

"In view of the diverse reasoning by many of the states concerning double jeopardy in situations similar to the instant case, it does not appear that the federal standard of double jeopardy in *Green v. United States, supra,* can be deemed so fundamental a concept of ordered liberty as to compel a total revision of state interpretations of the doctrine, which interpretations of their own constitutions are primarily the prerogative of the states."

REASONS FOR GRANTING THE WRIT

The issue presented by this petition is that pertaining to the inclusion or exclusion of the double jeopardy provisions of the Fifth Amendment within the Fourteenth Amendment. Petitioner claims neither novelty in the question nor lack of precedent on the issue. He does submit, however, the necessity for a revisit to these precedents and a compelling timeliness for such to be accomplished. Petitioner also submits that the result in *Mapp v. Ohio,* 367 U. S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961), and *Green v. United States,* 355 U. S. 184, 2 L. Ed. 2d 199, 78 S. Ct. 221, 61 A.L.R. 2d 1119 (1957), makes such inquiry more than expedient.

It would seem unassailable that the guidelines established in *Palko v. Connecticut,* 302 U. S. 319, 82 L. Ed. 288, 58 S. Ct. 149 (1937), as determinative of the conceptual nature of this problem have been unerringly recognized as valid. Thus rights become absorbed within the embrace of the Fourteenth Amendment because upon analysis of their nature in a democratic society they have become so fundamental as to meet the test there propounded by Justice Cardoza:

> "• • • Immunities that are valid as against the Federal Government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, became valid as against the States."

Petitioner here seeks not to dispute the rule in *Palko,* but rather its application or, more correctly, its lack of such. Specifically Petitioner seeks absorption of that portion of the Fifth Amendment providing that:

> "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *"

into the Fourteenth Amendment guarantees.

In the instant case Petitioner was originally charged with the crime of reckless homicide, being Burns Ind. Stat. Anno. Sec. 47-2001 (a), as follows:

> "Driving—(a) Reckless Homicide. Any person who drives a vehicle with reckless disregard for the safety of others and thereby causes the death of another person shall be guilty of the offense of reckless homicide. Any person convicted of reckless homicide shall be punished by a fine of not less than one hundred dollars ($100) or more than one thousand dollars ($1,000), or by imprisonment in the state farm for a determinate period of not less than sixty (60) days and not more than six (6) months, or by both such fine and such imprisonment, or by a fine of not more than one thousand dollars ($1,000) and imprisonment in the state prison for an indeterminate period of not less than one (1) year or more than five (5) years."

Subsequently, a separate count for involuntary manslaughter was added. This is Burns Ind. Stat. Anno. Sec. 10-3405, as follows:

> "*Manslaughter—Penalty*—Whoever voluntarily kills any human being without malice, expressed or implied, in a sudden heat, or involuntarily in the commission of some unlawful act, is guilty of manslaughter, and on conviction shall be imprisoned not less than two (2) years nor more than twenty-one (21) years. (Acts 1941, ch. 148, Sec. 2, p. 447)"

After two amendments, trial was had on both counts as provided in Burns Ind. Stat. Anno. Sec. 47-2002. That statute, although permitting the initial charge of both of-

fenses, recognized the *identity* of the offenses by providing that a judgment as to one was a bar to prosecution of the other. The statute reads as follows:

> "*Provisions for proceedings under preceding section.* All proceedings under section 52 (Sec. 47-2001) of this act shall be subject to the following provisions:
>
> (1) Each of the three (3) offenses defined in this section is a distinct offense. No one of them includes another, or is included in another one of them. Section 52, subsection (2) (Sec. 47-2001 (a)), in creating the offense of reckless homicide, does not modify, amend or repeal any existing law, but is supplementary thereto and to the other sections of this act. All three (3) of the offenses, or any two (2) of them, may be joined in separate counts in the same indictment or affidavit. One (1) or more of them may be joined in separate counts with other counts alleging offenses not defined in this section, such as involuntary manslaughter, if the same act, transaction or occurrence was the basis for each of the offenses alleged. With respect to the offenses of reckless homicide and involuntary manslaughter, a final judgment of conviction of one (1) of them shall be a bar to a prosecution for the other, or if they are joined in separate counts of the same indictment or affidavit, and if there is a conviction for both offenses, a penalty shall be imposed for one (1) offense only. (Acts 1939, ch. 48, Sec. 53, p. 289)"

The interrelation of the offenses is well established in Indiana. The statutory prohibition against a sentence as to both offenses and the bar created by the trial on one of such charges has evinced a legislative recognition of the jeopardy and collateral estoppel features and the qualitative identity of the offenses.

> **Rogers v. State, 227 Ind. 709, 88 N. E. 2d 755 (1949);**

State v. Beckman, 219 Ind. 176, 37 N. E. 2d 531 (1941);

Berman v. State, 232 Ind. 683, 115 N. E. 2d 919 (1953);

Idol v. State, 233 Ind. 307, 119 N. E. 2d 428 (1954).

In fact, the Indiana Court in this case recognized that the two charges were actually for the same offense with merely a difference in the penalty provided. The language at 208 N. E. 2d 688 is as follows:

> "The offenses here involved are statutorily treated more as one offense with different penalties rather than viewing reckless homicide as an included offense in involuntary manslaughter.
>
> "Since the elements of both counts are almost identical, it is recognized that a verdict of guilty of reckless homicide does not logically exclude the possibility of such a verdict on the charge of involuntary manslaughter for constitutional reasons as would be the case when a conviction is had on a lesser included offense. See Burns Ind. Stat. Anno. Sec. 47-2002 (1956 Repl.")

Thus neither offense is includable in the other.

Stevens v. State, 240 Ind. 19, 158 N. E. 2d 784 (1959).

In any event, trial resulted in a conviction as to the charge of reckless homicide, with no verdict as to the charge of involuntary manslaughter. The original appeal to the Indiana Supreme Court by Petitioner was successful and his Motion for New Trial was therefore sustained. An abundance of Indiana authority, recognized in the lower Court opinion, holds silence on a criminal charge tanta-

mount to acquittal. Rather than concede such, however, the lower court holds the elements of the two offenses to be identical with reckless homicide carrying the lesser penalty. Thus the Court in effect holds reckless homicide to be within the total coverage of involuntary manslaughter, a result completely opposed to the statute itself.

The new trial, however, was held as to both charges over Petitioner's strenuous and repeated objection. Thus, the involuntary manslaughter charge for which Petitioner had been once put in jeopardy and for which he had been legally acquitted was again the subject of the second trial against him. It is undoubtedly unique to permit a criminal defendant to be subjected in one trial to two counts which allege in reality the same offense (except for penalty). What is most repugnant, however, is that where a jury returns a verdict of guilty as to one of such offenses and what is legally an acquittal as to the other (such verdict is legally inconsistent at best, 60 Col. L. R. 998) and the defendant successfully appeals the conviction, he is then re-tried not only on the charge reversed, *but also upon the charge for which a legal acquittal had resulted.* The jeopardy to which Petitioner was initially subjected involved two criminal charges with identical qualitative elements and when he was re-tried for both of such charges (although he had legally been acquitted of one) he was in every real sense not only twice put in jeopardy, but actually *four* separate charges at two trials were brought against Appellant for the same offense. It would appear offensive enough to permit two charges for the same offense by separately enacting what amounts to the same criminal offense. However, to tolerate a second trial upon both of those charges where an acquittal as to one has already been effected is offensive to all of the basic concepts of

double jeopardy itself and of basic human rights inherent in a democratic society.

In *Green v. United States,* 355 U. S. 184, 2 L. Ed. 2d 199, 78 S. Ct. 221, 61 A.L.R. 2d 1119 (1957), this Court held violation of the Fifth Amendment a re-trial of a Defendant upon a greater charge after an appeal had been taken from a conviction of a lesser included charge. In so holding, the Court observed:

> "If Green had only appealed his conviction of arson and that conviction had been set aside surely no one would claim that he could have been tried a second time for first degree murder by reasoning that his initial jeopardy on that charge continued until every offense alleged in the indictment had been finally adjudicated." (355 U. S. 193)

Unfortunately, the assurance expressed by this Court that no one would make such a contention is destroyed here by the clear expression of the Indiana Supreme Court that exactly such a contention is not only made but is now the law in Indiana. That Court (Indiana) bases its opinion on a "waiver" theory and asserts that Petitioner permitted such a re-trial by his appeal of the original conviction. The waiver theory was thoroughly discarded in *Green* even where it involved degrees of the same includable offenses. Such certainly follows *a fortiori* where the offenses are distinctly made separate, non-includable offenses by statute.

> See: Cases collected in 80 A.L.R. 1108, as compared to those in 61 A.L.R. 2d 1141.

As stated in Green, "The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one

that should continue to be highly valued." (355 U. S. 198) This right is a fundamental right which should not be diluted by state reluctance to enforce whether under the guise of waiver or continuing jeopardy or whatever.

See: *Griswold,* The Long View, 51 A.B.A.J. 1017 (1965).

The opinion in this case recognizes its departure from *Green* and seeks justification for its pronouncements by diluting the quality of the protection against double jeopardy as "not necessarily" being "a hallmark of either system" (Federal or State). Such pronouncement in itself may portend the future of this protection in Indiana.

The difference in judicial result concerning specific issues and the not infrequent departure from such results is probably no more evident throughout the field of constitutional law than it is in concern over the ambit of the Fourteenth Amendment. Such has arisen not because of any disagreement over the *Palko* doctrine and in fact the recent trends of due process coverage rely as heavily on *Palko* as did the former. It seems indisputable that the process of change has arisen by "absorption", rather than "incorporation" and thus is one of progression and evolution rather than a simultaneity of adoption of the Bill of Rights into the Fourteenth Amendment.

See: Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment,* 78 Harv. L. Rev., 746.

Any juridicial concept of this nature has, of course, the attractiveness of practicality and the flexibility of adaptation to social change. *It necessarily requires, however, a frequent revisit of prior holdings on specific issues* not

to establish a gradual erosion of the rule but rather to prove its vitality. This has been repeatedly demonstrated throughout the history of the Court's concern with this area and has been evidenced most recently in several holdings on allied and closely analogous concepts.

Thus, historically the Fourteenth Amendment was held without relevancy or restraint to a state's action in regard to the "freedom of speech".

> *Prudential Ins. Co. v. Cheek,* 259 U. S. 530, 66 L. Ed. 1044, 42 S. Ct. 516, 27 A.L.R. 27 (1922).

As Justice Brennan set forth in *Malloy v. Hogan,* 378 U. S. 1, 12 L. Ed. 2d 653, 84 S. Ct. 1489 (1964), the advent of *Gitlow v. New York,* 268 U. S. 652, 69 L. Ed. 1138, 45 S. Ct. 625 (1925), initiated a series of decisions which now provide immunity from state invasion every First Amendment protection for the cherished rights of mind and spirit." (378 U. S. 5)

Similarly, the path of the Fourth Amendment has been gradual and perhaps long, but, nevertheless, straight and true. The expression of the federal "exclusionary" rule as applied to evidence obtained in an unreasonable search and seizure was clearly enunciated in *Weeks v. United States,* 232 U. S. 383, 58 L. Ed. 652, 34 S. Ct. 341 (1914). Subsequently, however, the Court refused to embrace this rule within the protection of the Fourteenth Amendment in regard to state action.

> *Wolf v. Colorado,* 338 U. S. 25, 93 L. Ed. 1782, 69 S. Ct. 1359 (1949).

Evolvement of the search and seizure protection continued through the "shocks the conscience" rule of *Rochin v. California,* 342 U. S. 165, 96 L. Ed. 183, 72 S. Ct. 205,

25 A.L.R. 2d 1396 (1952), the overruling of the "silver platter doctrine" in *Elkins v. United States,* 364 U. S. 206, 4 L. Ed. 2d 1669, 80 S. Ct. 1437 (1960), to the ultimate departure from *Wolf* in *Mapp v. Ohio,* 367 U. S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961), which absorbed the Fourth Amendment into the Fourteenth.

The full manifestation of *Mapp* was effectuated in *Murphy v. Waterfront Commission of New York,* 378 U. S. 52, 12 L. Ed. 2d 678, 84 S. Ct. 1594 (1964).

The course of the Sixth Amendment's guarantee of the right to counsel was similar, although perhaps less arduous. Denial of absorption first occurred in *Betts v. Brady,* 316 U. S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252 (1942). The pronouncements in *Gideon v. Wainwright,* 372 U. S. 335, 9 L. Ed. 799, 83 S. Ct. 792, 93 A.L.R. 2d 733 (1963), however, placed this guarantee within the framework of the Fourteenth Amendment.

See also: *Escobedo v. Illinois,* 378 U. S. 478, 12 L. Ed. 977, 84 S. Ct. 1758 (1964).

The companion protection against self-incrimination found in the Fifth Amendment leaves a similar history. There the original exploration of the problem occurred in *Twining v. New Jersey,* 211 U. S. 78, 58 L. Ed. 97, 29 S. Ct. 14 (1908), with the Court denying absorption. The doctrine was diluted in *Adamson v. California,* 332 U. S. 46, 91 L. Ed. 1903, 67 S. Ct. 1672, 171 A.L.R. 1223 (1947), and finally abandoned in *Malloy v. Hogan,* 378 U. S. 1, 12 L. Ed. 2d 653, 84 S. Ct. 1489 (1964). It is significant to note that *Malloy* re-visited *Twining* only three years after its last affirmance in *Cohen v. Hurley,* 366 U. S. 117, 6 L. Ed. 2d 156, 81 S. Ct. 954 (1961).

Even the right to compensation provision of the Fifth Amendment shows a similarity of evolution from *Barron v. Baltimore,* 7 Pet 243, 8 L. Ed. 672 to *Chicago B & O R. Co. v. Chicago,* 166 U. S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897).

Here we concern ourselves again with the protections against double jeopardy. Admittedly, the holding in *Palko* stands as an obstacle to full recognition of the fundamental nature of this right and its protection as such from state encroachment. Petitioner submits that the very evolutionary process of assimilation of rights within the protection of the Fourteenth Amendment requires a re-visit to and reversal of *Palko,* especially in view of *Green.* In addition, however, several other compelling reasons exist for a review of the *Palko* holding.

Initially such is compelled by the recognition of the basic and fundamental nature of this right. Little would be gained by repetition of the historical development of double jeopardy. Such was ably done in the dissent of Justice Black in *Bartkus v. Illinois,* 359 U. S. 121, 3 L. Ed. 2d 684, 79 S. Ct. 676 (1959), at page 150. Suffice it here to note that no less of an opponent to "absorption" than the late Justice Frankfurter clearly recognized the fundamental and vital nature of this concept in his dissent in *Green* (355 U. S. 200-201). It is perhaps of some comparative significance that the privilege against self incrimination which now enjoys the cloak of the Fourteenth Amendment has a far less noble and historical ancestry and was not found in the Magna Carta, Petition of Right, Bill of Rights of 1689 or any other basic English source of our liberties and, in fact, seems to be able to trace its ancestry back to only vague origin about the seventeenth century.

Bram v. United States, 168 U. S. 532, 42 L. Ed. 568, 18 S. Ct. 183 (1897);

Brown v. Walker, 161 U. S. 591, 40 L. Ed. 819, 16 S. Ct. 644 (1896).

A review of the holding in *Palko* is compelled also because of the very fear expressed by Justice Black in *Bartkus,* concerning the frequency of such occurrences (359 U. S. 159-162). Such increase is a natural residual of greater penetration *into* the criminal field by the Federal Government so as to create the dual sovereignty possibility existing in *Bartkus,* as well as the creation of multiple crimes having the same elements such as exists here. Thus both the qualitative nature of the right and the quantitative frequency of its violation necessitate a departure from the holding in *Palko* and *Bartkus.*

CONCLUSION

It is virtually impossible to calculate the effect on Petitioner of the multiple charges and trials here. Such is not lessened by the fact that conviction was found in each instance on only the reckless homicide charge. In the context of motor vehicle deaths, Indiana has two identical offenses differing only in the severity of the punishment. The evil of identical offenses with separate and unequal penalties is that a charge of both provides prosecution leverage to secure a guilty plea or a conviction of the lesser punished one. This alone is of dubious fairness in the administration of criminal justice, but to twice subject an accused to such an inherently coercive jury choice is fundamentally unfair.

Petitioner respectfully requests that a writ of certiorari issue herein and that this cause and the fundamental question which it presents be assumed by this Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1965

No. 345

RONALD R. CICHOS,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

APPENDIX TO PETITION FOR A WRIT CERTIORARI TO THE SUPREME COURT OF INDIANA

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No. ———

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APPENDIX
ORIGINAL OPINION OF THE SUPREME COURT OF INDIANA

No. 30,482

July 6, 1965

Before Achor, Judge

Plaintiff Ronald R. Cichos v. State of Indiana

Appellant was previously charged in two counts. (1) Involuntary Manslaughter, and (2) Reckless Homicide. He was convicted on the latter charge—the verdict was silent as to the charge of the first count. Said judgment was ap-

pealed to this court, which reversed the judgment with instructions to grant appellant a new trial.

Appellant was again charged with (1) Involuntary Manslaughter and (2) Reckless Homicide, and the resultant verdict was the same as that which resulted from the first trial.

In this, his second appeal, appellant urges six propositions of law which will be considered in the order in which they are presented in appellant's brief.

One: Appellant urges that the trial court committed reversible error by permitting the state to prosecute him a second time for either involuntary manslaughter or reckless homicide, for the reason that in the original trial the jury, by failing to make a finding as to the charge of involuntary manslaughter, impliedly had acquitted appellant on that charge, and further, since the factual circumstances involved in the charge for reckless homicide were the same infractions of the law as were involved in the count for involuntary manslaughter, the jury, therefore, having determined that appellant was not guilty of a crime involving these alleged acts, could not subject him a second time to a criminal charge involving the same infractions.

Admittedly there is substantial authority that silence as to one count of several counts of an indictment is equivalent to a verdict of not guilty on the count.

Smith v. State (1951), 229 Ind. 546, 99 N. E. 2d 417;

Ward v. State (1919), 188 Ind. 606, 125 N. E. 397;

Beaty v. State (1882), 82 Ind. 228;

Harvey v. State (1881), 80 Ind. 142;

Bryant v. State (1880), 72 Ind. 400;

Bonnell v. State (1878), 64 Ind. 498;

Weinzorflin v. State (1884), 7 Blackf. (Ind.) 186;

Ewbanks, Indiana Criminal Law Sec. 445, p. 282.

Also, the cases generally make no distinction as to whether the numerous counts are lesser included offenses, greater offenses, or merely different charges concerning the same transaction. In the leading case of *Weinzorflin v. State, supra,* the doctrine of silence being equivalent to an acquittal was promulgated with reference to the common law doctrine that a jury could not be dismissed until its facts from a situation where the court could judicially know that a verdict was returned. That case, however, distinguishes charges of the same offenses.

The distinction drawn in *Weinzorflin v. State, supra,* although supported by substantial logic, was not long observed, and the axiom, silence means acquittal, soon came to be applied with no regard as to whether the count on which the verdict was silent was a greater or lesser included offense or a different charge for the same unlawful transaction. See: *Beaty v. State, supra.* On the other hand, the logic of the principle which states silence is equal to an acquittal is perhaps made inappropriate to charges of these offenses, related to the same unlawful transaction, especially since this court judicially knows the trial court practice of telling the jury to return a verdict on only one of the charges in view of the limitation on penalty.

Rather than treat the silence of the jury in the involuntary manslaughter count in this case as an acquittal, the better result would seem to be to hold that the reckless

homicide verdict encompassed the elements of involuntary manslaugther,[1] and that appellant was simply given the lesser penalty.

Two: Under the state prohibition against double jeopardy (Constitution of Indiana, Art. 1, Sec. 14), as interpreted by the courts, the fact situation here involved does not present a case of double jeopardy.

State v. Balsley (1902), 159 Ind. 395, 65 N. E. 185;

Patterson v. State (1880), 70 Ind. 341;

Veatch v. State (1878), 60 Ind. 291;

Mills v. State (1875), 52 Ind. 187;

Ex Parte Bradley (1874), 48 Ind. 548;

Joy v. State (1886), 14 Ind. 139;

Weinzorpflin v. State, supra;

Morris v. State (1819), 1 Blackf. (Ind.) 37; accord;

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[1] ***Reckless Homicide*** **"Any person who drives a vehicle with reckless disregard for the safety of others and thereby causes the death of another person shall be guilty of the offense of reckless homicide. Any person convicted of reckless homicide shall be punished by a fine of not less than one hundred dollars ($100) or more than one thousand dollars ($1,000), or by imprisonment in the state farm for a determinate period of not less than sixty (60) days and not more than six (6) months, or by both such fine and such imprisonment, or by a fine of not more than one thousand dollars ($1,000) and imprisonment in the state prison for an indeterminate period of not less than one (1) year or more than five (5) years."**

Acts 1963, ch. 282, Sec. 1, p. 458 (being Burns' Ind. Stat. Anno. Sec. 47-2001 (2) (1964 Supp.))

Involuntary Manslaughter. **"Whoever . . . kills any human . . . involuntarily in the commission of some unlawful act, is guilty of manslaughter, and on conviction shall be imprisoned not less than two (2) years nor more than twenty-one (21) years."**

Acts 1941, ch. 148, Sec. 2, p. 447 (being Burns' Ind. Stat. Anno. Sec. 10-3405 (1956 Repl.)).

State ex rel. Lopez v. Killigrew (1931), 202 Ind. 397, 174 N. E. 808.

The Balsley case, *supra,* is substantially similar to the present controversy. In that case, appellee was tried on an indictment of two counts. One charged embezzlement and the other larceny. The jury verdict found appellee guilty of larceny but was silent as to the embezzlement count. Subsequently the larceny conviction was reversed on appeal and a new trial granted. Appellee, charged again with both larceny and embezzlement, filed a plea of abatement as to the embezzlement count claiming former jeopardy. A demurrer to the plea was overruled, but on appeal, this court reversed the overruling of the demurrer with a singularly appropriate discussion of double jeopardy. This court at page 397 stated:

> "The rights of the defendant and the State upon a new trial are clearly defined by statute: 'A new trial is a re-examination of the issues in the same court. The granting of a new trial places the parties in the same position as if no trial had been had; the former verdict cannot be used or referred to, either in the evidence or argument.' Sec. 1909, 1910, Burns 1901 (now Burns Ind. Stat. Anno. Sec. 9-1901, 9-1902 (1956 (Repl.))
>
> "It is entirely clear that when the appellee asked for and obtained a new trial of the issues in his case, the results of the previous trial were wholly vacated. He could not, under the indictment, take a new trial as to the issue upon one count, and not upon the other. If he obtained a new trial, he was bound to take it upon the terms and conditions of the statute, and one of those conditions was that 'the parties should be placed in the same position as if no trial had been had.' This point has been decided in many cases in this State, and must be considered as settled." (Citing cases.)

Three: Appellant finally contends that retrial under both counts of the indictment constituted double jeopardy as prohibited by the Fifth Amendment and the due process clause of the Fourteenth Amendment to the U. S. Constitution.

Appellant asserts that, despite the established Indiana law on this issue, a change in Indiana law is compelled by *Green v. United States* (1957), 355 U. S. 184, 2 L. Ed. 2d 199. However, among other facts which must be considered in relation to this assertion is the fact that the Green case was a federal case and therefore the rule enunciated arose under the U. S. Supreme Court's supervisory power over federal courts. The Green case involved a re-trial on a murder charge, and resulted in a verdict of guilty of first degree murder, after a prior trial which had resulted in a second degree murder conviction had been reversed on appeal. Applying the Fifth Amendment double jeopardy provision, the Supreme Court held that a conviction of a lesser included offense amounted to an acquittal of the greater offense. Consequently, they reasoned that, on retrial, the accused could be tried for no greater charge than that for which he was originally convicted.

Aside from the obvious fact that the Green case, *supra*, involved the application of federal law and federal standards, there is the distinction concerning the character of the charges twice in issue. The offenses here involved are statutorily treated more as one offense with different penalties rather than viewing reckless homicide as an included offense in involuntary manslaughter.

Since the elements of both counts are almost identical, it is recognized that a verdict of guilty of reckless homicide

does not logically exclude the possibility of such a verdict on the charge of involuntary manslaughter for constitutional reasons as would be the case when a conviction is had on a lesser included offense. See Burns Ind. Stat. Anno. Sec. 47-2002 (1956 Repl.)

When dealing with such interconnected offenses it is almost futile to attempt to sort out error and reverse a case only as to those errors which affected the defendant. Recognizing this futility, this state has accepted the position adopted by a substantial number of states, that when a defendant initiates an appeal asking for a new trial and the appeal discloses error, the original trial is treated as a total nullity, leaving the parties as they were prior to the proceeding tainted with error. Burns Ind. Stat. Anno. Sec. 9-1902 (1956 Repl.) Compare: *Green v. United States, supra,* 355 U. S. 184, 216 n. 4; 2 L. Ed. 2d 199, 220, n. 4 (dissenting opinion).

The protection against double jeopardy has never specifically been incorporated within the scope of the due process clause of the 14th Amendment, supra, by the Supreme Court.[2] Arguable, the double jeopardy provision is not necessarily a hallmark of either system, and it is reasonable to assume that some limitation on the total incorporation of the Fifth Amendment within the due process clause of the 14th Amendment may still exist.

In view of the diverse reasoning by many of the states concerning double jeopardy in situations similar to the instant case, it does not appear that the federal standard

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[2] The broad language in Malloy v. Hogan (1964), — U.S. —, 12 L. Ed. 2d 653, indicates a future possibility of such incorporation. See also: Hoag v. State of New Jersey (1958), 356 U.S. 464, 2 L. Ed. 2d 913 (five to three decision by Harlan, J., Warren, C. J., Douglas and Black, JJ., dissent).

of double jeopardy in *Green v. United States, supra,* can be deemed so fundamental a concept of ordered liberty as to compel a total revision of state interpretations of the doctrine, which interpretations of their own constitutions are primarily the prerogative of the states.

Judgment sustained.

Jackson, C. J. and Landis, J., concur in result.

Arterburn and Myers, JJ., concur.

ON PETITION FOR RE-HEARING IN THE SUPREME COURT OF INDIANA

No. 30,482

October 1, 1965

Before Achor, Judge

Plaintiff Ronald R. Cichos v. State of Indiana

Appellant has filed a petition for rehearing in which he asserts that this court, in its opinion as written, erred in two particulars.

First: That this court failed to comply with the requirements of Art. 7, Sec. 5 of the Indiana Constitution by failing to "give a statement in writing of each question arising in the record and the decision of the decision of the court thereon." It is not that this court has presumed to disregard this constitutional provision, but since the provision is merely directive and does not involve any substantive rights of the litigants involved, we have given it a reasonable construction consistent with the obviously intended purpose thereof. Accordingly we have limited our discussion to the principal contentions in the case, which, incidentally, were the issues discussed in oral argument.

We intentionally omitted from our discussion those "questions arising in the record" which seem frivolous, were not supported by substantial argument in the briefs or were so patently contrary to the well-established law of the state since a discussion thereof would merely constitute an unjustifiable encumbrance of the reported decisions of the state without making any contribution to the general body of the law.

Strong precedent has been established supporting the position that this *constitutional* provision is to be given reasonable rather than a literal construction. As stated by this court in *State ex rel. Sluss v. Appellate Court of Indiana* (1938), 214 Ind. 686, at 691-692, 17 N. E. 2d 824:

> "The constitutional provision quoted above (Art. 7, Sec. 5) must have, however, a reasonable interpretation as well as a practical application. It is not to be presumed that the framees of that document intended that this court should be required to exhaust every subject that might be raised on an appeal, without regard to its importance in the determination of the cause.
>
> 'In the case of *Willets v. Ridgway* (1857), 9 Ind. 367, 369, 370, Perkins, J., speaking for this court, said:
>
> 'It is true that the constitution, by an unwise provision, requires that this Court shall give a written opinion upon every point arising in the record of every case—a provision which, if literally followed, tends to fill our Reports with repetitions of decisions upon settled, as well as frivolous, points and often introduce into them, in the great press of business, premature and not well considered opinions, upon points only slightly argued; yet it is a provision not to be disregarded, though merely directory, like that requiring the legislature to use good *English*. But though the provision is not to be disregarded, *it is to be observed*

> ***according to some construction, and should receive such a one as to obviate*** its inconvenience and objectionable character, as far as consistently can be done.' " (our emphasis.)

Furthermore, in a more recent case, when confronted with circumstances very similar to those existing in the present case, this court in *Appelby v. State* (1943), 221 Ind. 544, at pp. 549-550, 48 N. E. 2d 646 (reh. den. 49 N. E. 2d 533), stated:

> "The appellant's motion for a new trial occupies forty-five (45) of the six hundred sixty-eight (668) pages of their printed brief. Sixty-six (66) separate and distinct legal propositions are presented for our determination. We cannot bring ourselves to believe that the framers of our State Constitution had any such situation in mind when they enjoined upon us the obligation to 'give a statement in writing of each question arising in the record' (Article 7, Section 5), or when they imposed upon the General Assembly the duty to provide for the 'speedy publication of the decisions' of this court (Article 7, Section 6). At the risk of being charged with failing to meet our responsibilities, *we feel obliged to limit our consideration of this case to what appear to be the principal contentions.* We have pointed out in the past that one prejudicial error clearly presented is enough to accomplish a reversal by this court. *Weer v. State* (1941), 219 Ind. 217, 36 N. E. 2d 787, 37 N. E. 2d 537." (our italics)

In other instances this court has applied the rule of reason to the above constitutional directive by providing that the court need not give a statement in writing of each question arising in the record, unless the parties have filed briefs and therein presented substantial argument regarding the issue so as to aid the court in making its decision regarding the questions presented by the record in such

case. Furthermore, as above noted, we have held that in reversing a case we need only discuss a single issue arising in the case which sustains the decision of this court.

In this case we have limited our consideration to those issues which we considered to be substantial questions and this we have endeavored to do in a comprehensive manner.

To demonstrate our reason for not discussing the other many specifications assigned as error, we make the following comment with regard to a few of such specifications, which are illustrative of those asserted in appellant's petition for rehearing. Appellant's Proposition II, Point 1, urges that the trial court committed prejudicial error by permitting State's Exhibit No. 3 to be admitted in evidence. Appellant claims that this exhibit, which was a photograph of one of the automobiles involved in the collision, was erroneously admitted because the body of one of the decedents was hanging from the wreckage and therefore the exhibit was calculated only to inflame the jury and served no other purpose. In support of his contention, appellant cites the case of *Kiefer v. State* (1958), 239 Ind. 103, 153 N. E. 2d 899. However, examination of that case reveals that it does not support appellant's contention but, rather, justifies the admission of the evidence since the picture was an unaltered part of the res gestae of the case.

Appellant's Proposition II, Point 2, urges that the trial court committed error in permitting the state's witness to describe a conversation which he had with a witness for the defense shortly after the accident and out of the appellant's presence. Appellant claims error with regard to the admission of such evidence notwithstanding the fact that said testimony was admitted explicitly for the purpose of impeaching the defense witness, pursuant to the

foundation which was laid in the cross-examination of said witness. The alleged error is contradicted by the well established law of this state as it has existed for 145 years.

In the early case of *Shields v. Cunningham* (1820), 1 Blackf. 86, at p. 87, this court stated:

> "We consider this to be the correct doctrine: Where a witness has, at other times and places, made statements repugnant or contradictory to those delivered in Court, and relative to facts material to the issue, the adverse party has a right to prove that circumstance in order to discredit the witness, or diminish the weight of his testimony; . . ."

The credibility of a witness, party, or accused may be attacked by showing that at another time and place he made an oral or written statement inconsistent or contradictory to his testimony. See: *Pollard v. State* (1950), 229 Ind. 62, 94 N. E. 2d 912. See also: Wigmore on Evidence, Sec. 884, p. 376.

In the present case other specifications involved numerous instructions tendered by the appellant on the subject of mere negligence as related to the charge of involuntary manslaughter or reckless homicide. The court's own instructions adequately covered this subject, and it was not therefore necessary for the court to read all of the appellant's array of instructions which would have, if given, had the effect of over-emphasizing the subject of "mere negligence" as an element in the case.

Likewise, appellant complains that the court did not give numerous instructions on the subject of reasonable doubt. This subject was also adequately presented by the court's own instructions. In fact, one of appellant's instructions, which the court refused to give, was given

verbatim by the court as one of his own instructions. The absence of any merit to these specifications is so patent that no discussion seemed necessary.

Furthermore, appellant's Proposition II, Point 2, urges that the trial court erred in giving its instruction No. 2. True, appellant has engaged in a lengthy dissertation in his brief regarding this instruction. Although the instruction is subject to some rhetorical weakness, we cannot say that it was legally incorrect or that the jury was mislead thereby. As demonstrated in appellee's brief, this instruction is supported by the case law of the state, and appellant has not favored us with a reply brief which refutes the conclusiveness of this authority.

As previously stated, the above specifications of error were not previously considered by this court in its opinion but were omitted because they were patently without merit, and although the constitution provides that the court "give a statement in writing of *each question* arising in the record" of such case, we are of the opinion that the law is so firmly established with regard to the specifications of error asserted by appellant that there is, in reality, no substantial question with regard to such specifications and, therefore, that within a reasonable construction of the constitutional directive it was unnecessary that the court encumber the opinion which a discussion of this voluminous subject matter.

Secondly: Appellant reasserts that the verdict against him is void for the reason that the implied finding of not guilty in the prior trial with respect to the charge of involuntary manslaughter requires the conclusion that appellant was also not guilty of reckless homicide, both of which offenses involved the same acts on his part. This

issue was fully considered, and we believe correctly so, in the opinion as written.

Rehearing denied.

Arterburn & Myers, JJ., concur.

Jackson, C. J. & Landis, J., concur in the result.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT XIV—Citizenship; Privileges and Immunities, Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

Burns Indiana Statutes, Annotated, Section 9-1901

"*Definition*: A new trial is a re-examination of the issues in the same court. (Acts 1905, ch. 169, Sec. 280, 584."

Burns Indiana Statutes, Annotated, Section 9-1902

"*Effect of granting—Former verdict not to be referred to in argument.*

"The granting of a new trial places the parties in the same position as if no trial had been had; the former verdict can not be used or referred to, either, in the evidence or in the argument. (Acts 1905, ch. 169, Sec. 281, p. 584)"

Burns Indiana Statutes, Annotated, Section 47-2001

"Driving—(a) Reckless Homicide. Any person who drives a vehicle with reckless disregard for the safety of others and thereby causes the death of another person shall be guilty of the offense of reckless homicide. Any person convicted of reckless homicide shall be punished by a fine of not less than one Hundred dollars ($100) or more than one thousand dollars ($1,000) or by imprisonment in the state farm for a determinate period of not less than sixty (60) days and not more than six (6) months, or by both such fine and such imprisonment, or by a fine of not more than one thousand dollars ($1,000) and imprisonment in the state prison for an indeterminate period of not less than one (1) year or more than five (5) years."

Burns Indiana Statutes Annotated, Section 10-3405

"*Manslaughter—Penalty.* Whoever voluntarily kills any human being without malice, expressed or implied, in a sudden heat, or involuntarily in the commission of some unlawful act, is guilty of manslaughter, and on conviction shall be imprisoned not less than two (2) years nor more than twenty-one (21) years. (Acts 1941, ch. 148, Sec. 2, p. 447)"

DEFENDANT'S VERIFIED SPECIAL PLEA OF FORMER JEOPARDY

(R. P. 83-94)

Comes now the defendant, Ronald Richard Cichos, by his counsel, Warren Buchanan and John B. McFaddin, and for an additional special plea herein, alleges and says:

1. That on November 6, 1958, a second amended affidavit in this cause was filed in the Parke Circuit Court; that in said second amended affidavit this defendant was charged in two counts with the statutory offenses of reckless homicide, by count 1 thereof, and involuntary manslaughter, by count 2 of said second amended affidavit; that a bench warrant was issued by the Parke Circuit Court for the arrest of said defendant on said charges; that this defendant was thereupon arrested and held to answer to said charges; that a copy of the second amended affidavit herein charging this defendant with such offenses; certified as true and correct by the Clerk of this Court, is attached hereto, made a part hereof and marked Exhibit "A".

2. That by its terms, said second amended affidavit charged that this defendant on September 28, 1958, in Parke County, Indiana, committed the offenses of reckless homicide and involuntary manslaughter by then and there, unlawfully and feloniously, operating a motor vehicle upon and a long a highway at and in the County of Parke, in

the State of Indiana, while under the influence of intoxicating liquor, and that the said defendant then and there drove and operated his said automobile into and against an automobile then and there driven and operated on said highway and in and on which one Frank Glen Barber and Shella Mae Barber were then and there riding and that the said Frank Glen Barber and Shella Mae Barber were injured and wounded as a result of such collision and that they died as a result thereof on September 28, 1958.

3. That the defendant was arraigned in the Parke Circuit Court, before the judge thereof, on November 24, 1958, and entered a plea of not guilty to the charges of reckless homicide and involuntary manslaughter as contained in said second amended affidavit.

4. That during the months of November and December, 1959, this cause was tried in the Parke Circuit Court, and that the jury, at the trial of said cause, returned a verdict finding the defendant guilty of reckless homicide, as charged in said second amended affidavit that the jury, at the trial of said cause, did not return a verdict finding the defendant guilty of involuntary manslaughter, as charged in count 2 of the second amended affidavit herein; that the Court rendered judgment of conviction and sentence on the verdict in this cause on February 16, 1960; that the defendant filed a motion for new trial in said cause, and that such motion was over-ruled by the Court; that on August 12, 1960, and within the time granted by the Supreme Court of Indiana for such purpose, the defendant filed a transcript of the record and assignment of errors on an appeal of said conviction to said Supreme Court of Indiana; that on July 2, 1962, the Supreme Court of Indiana reversed the judgment of conviction of the defendant and this cause was remanded to this Court

with instructions to sustain defendant's motion for new trial; that this cause is now assigned for re-trial in this Court for June 13, 1963; that a copy of the verdict returned by the jury herein finding the defendant guilty only of the offense of reckless homicide, certified as true and correct by the Clerk of this Court, is attached hereto, made a part hereof and marked Exhibit "B".

5. That the defendant is now charged with the statutory offenses of reckless homicide and involuntary manslaughter, as charged in counts 1 and 2, respectively, of the second amended affidavit herein; that the jury in the original trial of this cause, by failing to return a verdict as to the second count of the second amended affidavit herein, by implication, acquitted the said defendant of the charge of involuntary manslaughter.

6. That the prior prosecution and acquittal of the defendant on the charge of involuntary manslaughter would now bar any further prosecution of said defendant based upon the same crime.

7. That the facts necessary to convict the defendant on count 2 of the second amended affidavit now pending in this Court were adjudicated by the failure of the jury at the prior trial of the same to return a verdict on said count, thus acquitting said defendant of said crime; that the defendant cannot be placed in jeopardy, the second time, for the same offense; that prosecution to a final judgment of the offense in the prior trial of the same is a bar to his prosecution as to the second count of the second amended affidavit now pending in this Court.

WHEREFORE, The defendant prays that the charge of involuntary manslaughter as set forth in the second

count of the second amended affidavit now pending against him be dismissed.

RONALD RICHARD CICHOS, Defendant, By:

SECOND AMENDED AFFIDAVIT

COUNT 1

For Count 1—

Jay W. Dennis being duly sworn upon his oath, says:

That Ronald Richard Cichos, on the 28th day of September, 1958, at and in the County of Parke, in the State of Indiana, did then and there unlawfully and feloniously drive and operate a certain motor vehicle, to-wit: a Cadillac automobile, on United States Highway No. 36 and said highway was then and there of sufficient width for two lanes of automobile traffic and was then and there maintained as a two-lane highway in the County of Parke and State of Indiana aforesaid, with reckless disregard for the safety of others by then and there operating his said automobile while under the influence of intoxicating liquor and by then and there driving and operating his said automobile on the half of said highway to his left and into and against an automobile in which Frank Glen Barber and Shella Mae Barber were then and there riding and the said Barber automobile was then and there driven and operated in its right half of said United States Highway No. 36, and the said Ronald Richard Cichos did then and there and thereby cause the death of the said Frank Glen Barber and Shella Mae Barber, and the said unlawful, reckless and wanton acts aforesaid of the said Ronald Richard Cichos was the proximate cause of the deaths of the said Frank Glen Barber and Shella Mae Barber, contrary to the form of the statutes in such cases made and pro-

vided and against the peace and dignity of the State of Indiana.

(Signed) Jay W. Dennis

COUNT 2

For Count 2—

Jay W. Dennis being duly sworn upon his oath, says:

That Ronald Richard Cichos on the 28th day of September, 1958, at and in the County of Parke, in the State of Indiana, did then and there unlawfully and feloniously without malice either expressed or implied and involuntarily did kill Frank Glen Barber and Shella Mae Barber, human beings, by then and there unlawfully and feloniously driving and operating a motor vehicle, to-wit: a Cadillac automobile and in and upon and along a certain highway at and in the County of Parke, and State of Indiana, to-wit: United States Highway No. 36 while he, the said Ronald Richard Cichos was then and there under the influence of intoxicating liquor and the said Ronald Richard Cichos did then and there unlawfully and feloniously, while under the influence of intoxicating liquor, drive and operate said automobile into and against an automobile then and there driven and operated on the said United States Highway No. 36 and in and on which the said Frank Glen Barber and Shella Mae Barber were then and there riding and said Ronald Richard Cichis did then and there unlawfully and feloniously but involuntarily and without malice, inflict mortal wounds and injuries in and upon the bodies of the said Frank Glen Barber and Shella Mae Barber, of which they sickened and lanquished and from which mortal wounds did die on September 28, 1958 at and in the County

of Parke and State of Indiana, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State of Indiana.

(Signed) Jay W. Dennis

Verdict

We, the jury, find the defendant guilty of Reckless Homicide as charged in County One of the Affidavit and find his age to be 26 years.

/s/ Dewy Hazlett
Foreman

DEMUR TO DEFENDANT'S VERIFIED SPECIAL PLEA OF FORMER JEOPARDY

(R. P. 97-98)

Comes now State of Indiana by Earl M. Dowd, Prosecuting Attorney and demur to defendant "verified special plea of former jeopardy" on each of the following grounds:

1. Said verified special plea of former jeopardy does not state facts sufficient to bar a prosecution by the State of Indiana of the defendant's on the charge of involuntary manslaughter as contained in the second count of the second amended affidavit herein.

2. Said verified special plea of former jeopardy does not state facts sufficient for the State of Indiana to dismiss the charge of involuntary manslaughter contained

in the second count of the second amended affidavit of hearing.

/s/ Earl M. Dowd

PROSECUTING ATTORNEY
68th JUDICIAL CIRCUIT OF
INDIANA

• • • • •

MEMORANDUM

By statute in the State of Indiana, Burns Indiana Statutes, Annotated replacement 9-1902 which says "the granting of a new trial places the parties in the same position as if no trial had been had." The Courts have said by way of interpretation of this statute, that it is entirely clear that when the defendant asks for and obtained a new trial of the issue the results of previous trial were wholly vacated. He cannot under the indictment take a new trial as to the issue upon one count and not upon the other. If he obtained a new trial he was bound to take it upon the terms and conditions of the statute, and one of these conditions was that the parties should be placed in the same position as if no trial had been had. This point has been decided in many cases in this state and must be considered as settled, 159 Indiana 395—202 Indiana 397.

Court's Entry on Defendant's Plea of Former Jeopardy June 12, 1963—"and the Court now sustains the demurrer of the State of Indiana to the Special Plea of Former Jeopardy by Defendant and that said verified petition does not state facts sufficient to bar the prosecution or to dismiss the same. (R. P. 99)

MOTION OF DEFENDANT FOR THE COURT TO DIRECT JURY TO RETURN VERDICT FOR THE DEFENDANT AND FOR DISCHARGE OF THE DEFENDANT AT CONCLUSION OF STATE'S CASE IN CHIEF.

(R. P. 121-123)

Comes now the defendant, by his attorneys, Warren Buchanan and John B. McFaddin, at the conclusion of the prosecution's case in chief and after the prosecution has rested and before the introduction of evidence in support of the defendant's defense and moves the Court to forthwith direct a verdict herein for the defendant and to discharge the defendant from custody, and tenders and offers an instruction for such purpose, for the following reasons and for each of said reasons, separately and severally considered, to-wit:

1. The prosecution has wholly failed to prove and establish by competent evidence beyond a reasonable doubt that the offenses alleged and charged in the 2nd Amended Affidavit, or either of them, or any offense included therein, were committed as charged in said 2nd Amended Affidavit.

2. The prosecution has wholly failed to prove and establish by competent evidence beyond a reasonable doubt the corpus delicti of the offenses of Reckless Homicide or Involuntary Manslaughter, or either of them, as charged in the 2nd Amended Affidavit.

3. The competent evidence offered by the State and admitted by the Court is not sufficient to sustain a verdict of guilty.

4. There is not a sufficient amount of competent, admissible evidence in the record from which the jury can

find that the State has proved the material allegations of either count of the 2nd Amended Affidavit beyond all reasonable doubt in accordance with Court's Preliminary Instructions Numbered 5, 7 and 8.

5. The defendant at the original trial of this case was acquitted and, by implication, found not guilty of Involuntary Manslaughter, as charged in Count II of the 2nd Amended Affidavit. The defendant cannot be tried more than one time for the same offense. Therefore, in the present trial, the jury should be directed to return a verdict finding the defendant not guilty of the offense of Involuntary Manslaughter charged in Count II of the 2nd Amended Affidavit.

WHEREFORE, the defendant asks that the jury be forthwith directed to return a verdict herein finding the said defendant not guilty of the offenses charged in the 2nd Amended Affidavit, or of any lesser degree thereof, or of any offenses included therein, and that he be discharged.

Filed in open court this 25th day of June, 1963.

RONALD RICHARD CICHOS, Defendant,

INSTRUCTION DIRECTING JURY TO RETURN VERDICT FOR DEFENDANT TENDERED WITH DEFENDANT'S WRITTEN MOTION FOR SUCH PURPOSE.

INSTRUCTION NO. A

Members of the jury you are directed to immediately and forthwith return a verdict finding the defendant not guilty of the offenses charged in the 2nd Amended Affidavit in this cause.

JUDGE, THE PARKE CIRCUIT COURT.

INSTRUCTION DIRECTING JURY TO RETURN VERDICT FOR DEFENDANT TENDERED WITH DEFENDANT'S WRITTEN MOTION FOR SUCH PURPOSE

INSTRUCTION NO. B

Members of the jury you are directed to immediately and forthwith return a verdict finding the defendant not guilty of the offense charged in Count II of the 2nd Amended Affidavit in this cause.

JUDGE, the Parke Circuit Court, Court's Entry on Motion for Directed Verdict June 25, 1963—"Comes defendant by his counsel and at the close of the State's case in chief, files written motion for the Court to direct jury to return a Verdict for the defendant and for discharge of the defendant at conclusion of State's case in chief. Argument heard and Court over-rules said motion." (R. P. 126)

MOTION OF DEFENDANT FOR THE COURT TO DIRECT JURY TO RETURN VERDICT FOR THE DEFENDANT AND FOR DISCHARGE OF THE DEFENDANT AT CONCLUSION OF ALL EVIDENCE IN THE CASE.

(R. P. 128-130)

Comes now the defendant, by his attorneys, Warren Buchanan and John B. McFaddin, at the conclusion of all of the evidence in the case, and before argument and before the Court has instructed the jury and moves the Court to forthwith direct a verdict herein for the defendant and to discharge the defendant from custody, and tenders and offers an instruction for such purpose, for the following reasons and for each of said reasons, separately and severally considered, to-wit:

1. The prosecution has wholly failed to prove and establish by competent evidence beyond a reasonable doubt that the offenses alleged and charged in the 2nd Amended Affidavit, or either of them, or any offense included therein, were committed as charged in said 2nd Amended Affidavit.

2. The prosecution has wholly failed to prove and establish by competent evidence beyond a reasonable doubt the corpus delicti of the offenses of Reckless Homicide or Involuntary Manslaughter, or either of them, as charged in the 2nd Amended Affidavit.

3. The competent evidence offered by the State and admitted by the Court is not sufficient to sustain a verdict of guilty.

4. There is not a sufficient amount of competent, admissible evidence in the record from which the jury can find that the State has proved the material allegations of either count of the 2nd Amended Affidavit beyond all reasonable doubt in accordance with Court's Preliminary Instructions Numbered 5, 7 and 8.

5. The defendant at the original trial of this cause was acquitted and, by implication, found not guilty of Involuntary Manslaughter, as charged in Count II of the 2nd Amended Affidavit. The defendant cannot be tried more than one time for the same offense. Therefore, in the present trial, the jury should be directed to return a verdict finding the defendant not guilty of the offense of Involuntary Manslaughter charged in Count II of the 2nd Amended Affidavit.

WHEREFORE, the defendant asks that the jury be forthwith directed to return a verdict herein finding the said defendant not guilty of the offenses charged in the

2nd Amended Affidavit, or of any lesser degree thereof, or of any offenses included therein, and that he be discharged.

RONALD RICHARD CICHOS, Defendant,

INSTRUCTION DIRECTING JURY TO RETURN VERDICT FOR DEFENDANT TENDERED WITH DEFENDANT'S WRITTEN MOTION FOR SUCH PURPOSE.

INSTRUCTION NO. A

Members of the jury you are directed to immediately and forthwith return a verdict finding the defendant not guilty of the offenses charged in the 2nd Amended Affidavit in this cause.

JUDGE, THE PARKE CIRCUIT COURT

INSTRUCTION DIRECTING JURY TO RETURN VERDICT FOR DEFENDANT TENDERED WITH DEFENDANT'S WRITTEN MOTION FOR SUCH PURPOSE.

INSTRUCTION NO. B

Members of the jury you are directed to immediately and forthwith return a verdict finding the defendant not guilty of the offense charged in Count II of the 2nd Amended Affidavit in this cause.

JUDGE, THE PARKE CIRCUIT COURT.

Court's Entry on Motion to Direct Verdict June 26, 1963

"Defendant files motion for the Court to Direct Jury to Return Verdict for the defendant and for discharge of defendant at conclusion of all the evidence in this case, said

motion submitted without argument. Court overrules Defendant's motion." (R.P. 133)

MOTION IN ARREST OF JUDGMENT

(R. P. 233-235)

Comes now RONALD RICHARD CICHOS, defendant in the above-entitled cause of action by his attorneys of record, Warren Buchanan and John B. McFaddin, and as such defendant and before the State of Indiana has moved the Court for judgment on the verdict in this cause, and before judgment has been rendered in said cause, files this application in writing asking that no judgment be rendered on said verdict of the jury herein finding this defendant guilty of reckless homicide as charged in Count 1 of the second amended affidavit herein and finding his age to be 29 years and said defendant respectfully moves the court that judgment in the above-entitled cause be arrested on the following grounds, to-wit:

(1) That the facts stated in Counts 1 and 2 of the second amended affidavit herein do not constitute a public offense under the laws of the State of Indiana.

(2) That the verdict of the jury returned in this cause on June 28, 1963, purported to find the defendant guilty of the offense of reckless homicide, as charged in Count 1 of the second amended affidavit herein, and that said verdict, by implication, found the said defendant not guilty and acquitted said defendant of the charge of involuntary manslaughter as charged in Count 2 of said amended affidavit. That said verdict is contrary to law and that said verdict is fatally defective in that it purports to convict the defendant of one offense and then acquit him of another, although the offense of involun-

tary manslaughter, as charged in Count 2 of said second amended affidavit, possesses all of the elements factually and legally of the offense of reckless homicide as charged in Count 1 of said affidavit; the second amended affidavit, which was based on a single set of facts, was in two counts based on Burns' Statutes Section 47-2001(a) and Burns' Statutes Section 10-3405; a conviction of reckless homicide cannot properly exist, either simultaneously or subsequently to an acquital of involuntary manslaughter based on the same facts; accordingly, the inconsistency of the verdict herein is fatal and said verdict will not support a judgment and sentence based thereon; legal inconsistency in a verdict has the effect of making such a verdict a nullity and no judgment or conviction based thereon can be entered; the entry of a judgment or conviction on the verdict in this cause would violate the rules of collateral estoppel and double jeopardy; the verdict is one upon which no valid judgment can possibly be entered without being contrary to law.

(3) That the defendant intends to file a motion for new trial in this cause; that the present recognizance of the defendant in the amount of $4,000.00, as fixed by the Court, is adequate and that judgment should not be rendered and such present recognizance of said defendant should be continued, until the defendant has had an opportunity to file a motion for new trial herein, and for the Court to consider said motion for new trial and enter an order with regard to the same.

WHEREFORE, The defendant prays that no judgment be rendered herein on the verdict of the jury returned this day and finding said defendant guilty of reckless homicide as charged in Count 1 of the second amended affidavit herein and finding his age to be 29 years; that judg-

ment herein be arrested for a period of at least thirty (30) days following the date of the verdict of the jury herein in order that the said defendant may have a proper opportunity to file his written motion for new trial herein.

Dated and filed in open court this 28th day of June, 1963.

RONALD RICHARD CICHOS, Defendant,

DEFENDANT'S MOTION FOR NEW TRIAL

(R. P. 247-260)

Comes now Ronald Richard Cichos, the defendant in the above-entitled cause by John B. McFaddin and Warren Buchanan, his attorneys, and moves the Court for a new trial thereof for the following reasons and causes, and each of said reasons and causes, separately and severally considered, to-wit:

1. Irregularities in the proceedings of the Court, or jury, and for orders of the Court and abuse of discretion by which the defendant was prevented from having a fair trial in this, to-wit:

The Court erred in over-ruling the defendant's motion to quash counts one (1) and two (2) of the second amended affidavit upon which the defendant was tried in this cause.

2. Irregularities in the proceedings of the Court, or jury, and for orders of the Court and abuse of discretion by which the defendant was prevented from having a fair trial in this, to-wit:

The Court erred in sustaining the demurrer of the State of Indiana to the defendant's verified spe-

cial plea of former jeopardy addressed to the charge against the defendant of the offense of involuntary manslaughter as set forth in the second court of the second amended affidavit upon which the defendant was tried in this cause.

3. Error of law occurring at the trial in this, to-wit:

The Court erred in over-ruling the defendant's objection to the admission into evidence of State's Exhibit 3. The basis for the defendant's original objection to State's Exhibit 3 was upon the ground and for the reason that the dead body of Mrs. Shella Barber and an empty shoe appeared in the photograph. The defendant objected to the admission in evidence of State's Exhibit 3 for the reason that the appearance of the dead body and the empty shoe in the photograph would only tend to inflame and prejudice the members of the jury without contributing anything toward showing the position of the Barber car and the defendant's car following the collision. The Court overruled the defendant's objection to the admission in evidence of State's Exhibit 3.

4. Error of law occurring at the trial in this, to-wit:

The Court erred in over-ruling and in refusing to sustain the defendant's motion that the part of the photograph marked State's Exhibit 3 showing the dead body of Mrs. Shella Barber and an empty shoe be covered with blank paper to be pasted over such parts of said photograph before said photograph was exhibited to the jury.

The defendant's objection to State's Exhibit 3 and the defendant's motion with regard to the covering of

the part of the photograph marked as State's Exhibit 3 showing the dead body of Mrs. Shella Barber and an empty shoe are as follows:

"DIRECT EXAMINATION

RUFUS C. FINNEY

By Earl M. Dowd:

* * * * *

Q. And State's Exhibit 3 for purposes of identification and ask you if you can identify that:

A. Yes I can, this picture was taken also looking west at the scene of the accident. It shows a terrific amount of damage done to—received by the '53 Plymouth. Also shows one of the subjects at the scene.

* * * * *

Attorney Dowd: At this time your Honor the State is asking that these Exhibits be introduced into evidence and displayed to the Jury.

Attorney McFaddin: Defense has no objection to the introduction of what has been marked State's Exhibits 1, and 2 and 5, 6, 7 and 8, but we do object to the introduction of 3 and 4 and would like to be heard out of the presence of the Jury Judge on my reasons.

Court: Jury excused for 10, 15 or 20 minutes.

Attorney McFaddin: Withdraw our objection to State's Exhibit 4.

Court: The Court will overrule objection of defendant to Exhibit 3 and it will be admitted

Jury excused until 1:00 o'clock

Attorney Buchanan: The defendant, after his objection to the introduction into evidence of State's Exhibit No. 3 has been over-ruled, now moves the Court that the portion of the photograph indicated as Exhibit 3 showing the body of Mrs. Barber and an empty shoe be masked out of the photograph for the reason that the part of the photograph showing the body and the shoe would only tend to inflame the jury and arouse prejudice against the defendant and the part of the photograph showing the body and the empty shoe can be masked out of the photograph without effecting any part of the evidence in this cause. I think that's a reasonable request Judge, that the body be—just take a piece of paper and fasten over that with scotch tape and it would still show everything that the State has said that that should be introduced for.

Court: Well they say anything disclosed by this a witness could testify to, couldn't he testify to this position here of this car and this woman here in this position and it showed that she was dead later by determination of an inquest—I don't know how they determined she was dead, whether they determined that or not. That's one of the things they have got to prove, this woman was dead.

Attorney Buchanan: Witness has already testified that Mr. and Mrs. Barber were killed, without reference to that.

Court: Well they hold that cumulative evidence is not sufficient ground to exhibit, and also there are other things that might be shown that was shown in one of these cases, that the witness hadn't testified to it disclosed in the photograph. Well, that's the

ruling of the Court and we are ready to go ahead. The Court will overrule the objection of defendant to Exhibit 3 and we will admit the Exhibits numbered from 1 to 8 inclusive and they are to be passed to the Jury for inspection. I would submit them according to their numbers, No. 1 first and then on down the line."

5. Error of law occurring at the trial in this, to-wit:

The Court erred in permitting the State's witness, Hugh Thompson, on rebuttal, to answer the following question put to him by the Prosecuting Attorney, as a witness for the State of Indiana, on rebuttal, over the objection of the defendant which question, preliminary question by defendant, objection, ruling of the Court, and answer are as follows:

"HUGH THOMPSON

REBUTTAL EVIDENCE

DIRECT EXAMINATION

By Earl M. Dowd:

Q. I will ask you whether or not at that time Mr. Lowe did not tell you this or this in substance, that on that particular morning Ronald Cichos was drunk and intoxicated and had no business driving an automobile?

Attorney Buchanan: Just a minute Hugh. Your Honor could I ask the witness a Preliminary Question please.

Q. Mr. Thompson was Ronald Richard Cichos present at the time you had this conversation, this alleged conversation, with Mr. Lowe?

A. No sir.

Attorney Buchanan: The defendant objects to the question your Honor for the reason that the question calls for what took place in an alleged conversation between the witness and a third party out of the presence of the defendant.

Court: I don't understand that impeachment that the conversation has got to be in the presence of the defendant. I don't think that's a requirement, just it goes to the particular testimony of that particular witness. I'll overrule the objection. You can answer.

Attorney Dowd: You may answer the question. Do you want it re-read to you?

Witness: Please.

Q. I will ask you whether or not at that time Mr. Lowe did not tell you this or this in substance, that on that particular morning Ronald Cichos was drunk and intoxicated and had no business driving an automobile?

A. That's right, in substance, yes.

Q. That was the substance of the conversation between you and Mr. Lowe?

A. That's right."

6. Error of law occurring at the trial in this, to-wit:

The Court erred in over-ruling defendant's motion, at the conclusion of evidence presented by the State of Indiana, and after the State of Indiana had rested its case, that the jury be forthwith directed to return a verdict herein finding the said defendant not guilty of the offenses charged in the 2nd amended affidavit

in this cause, and in refusing to give the jury an instruction then and there tendered to the Court by the defendant for such purpose, which said tendered instruction was as follows:

INSTRUCTION DIRECTING JURY TO RETURN VERDICT FOR DEFENDANT TENDERED WITH DEFENDANT'S WRITTEN MOTION FOR SUCH PURPOSE.

INSTRUCTION NO. A

Members of the jury you are directed to immediately and forthwith return a verdict finding the defendant not guilty of the offenses charged in the 2nd Amended Affidavit in this cause.

JUDGE, THE PARKE CIRCUIT COURT.

7. Error of law occurring at the trial in this, to-wit:

The Court erred in over-ruling defendant's motion, after the State of Indiana and the defendant had rested, and after the introduction of all of the evidence in this cause had been completed, and before argument of counsel, that the jury be forthwith directed to return a verdict herein finding the said defendant not guilty of the offenses charged in the 2nd amended affidavit in this cause, and in refusing to give to the jury an instruction then and there tendered to the Court by the defendant for such purpose, which said instruction was as follows:

INSTRUCTION DIRECTING JURY TO RETURN VERDICT FOR DEFENDANT TENDERED WITH DEFENDANT'S WRITTEN MOTION FOR SUCH PURPOSE.

INSTRUCTION NO. B

Members of the jury you are directed to immediately and forthwith return a verdict finding the defendant not guilty of the offense charged in Count II of the 2nd Amended Affidavit in this cause.

JUDGE, THE PARKE CIRCUIT COURT.

8. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 2 as requested and tendered by the defendant to which the defendant excepted.

9. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 8 as requested and tendered by the defendant to which the defendant excepted.

10. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 10 as requested and tendered by the defendant to which the defendant excepted.

11. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 13 as requested and tendered by the defendant to which the defendant excepted.

12. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 16 as requested and tendered by the defendant to which the defendant excepted.

13. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 17 as requested and tendered by the defendant to which the defendant excepted.

14. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 18 as requested and tendered by the defendant to which the defendant excepted.

15. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 19 as requested and tendered by the defendant to which the defendant excepted.

16. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 20 as requested and tendered by the defendant to which the defendant excepted.

17. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 22 as requested and tendered by the defendant to which the defendant excepted.

18. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 23 as requested and tendered by the defendant to which the defendant excepted.

19. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 24 as requested and tendered by the defendant to which the defendant excepted.

20. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 25 as requested and tendered by the defendant to which the defendant excepted.

21. Error of law occuring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 29 as requested and tendered by the defendant to which the defendant excepted.

22. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 32 as requested and tendered by the defendant to which the defendant excepted.

23. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 33 as requested and tendered by the defendant to which the defendant excepted.

24. Error in law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 34 as requested and tendered by the defendant to which the defendant excepted.

25. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruc-

tion No. 35 as requested and tendered by the defendant to which the defendant excepted.

26. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 36 as requested and tendered by the defendant to which the defendant excepted.

27. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 37 as requested and tendered by the defendant to which the defendant excepted.

28. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 38 as requested and tendered by the defendant to which the defendant excepted.

29. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 40 as requested and tendered by the defendant to which the defendant excepted.

30. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 46 as requested and tendered by the defendant to which the defendant excepted.

31. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 47 as requested and tendered by the defendant to which the defendant excepted.

32. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 48 as requested and tendered by the defendant to which the defendant excepted.

33. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 51 as requested and tendered by the defendant to which the defendant excepted.

34. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 52 as requested and tendered by the defendant to which the defendant excepted.

35. Error of law occurring at the trial in this, to-wit:

That the Court erred in refusing to give Instruction No. 53 as requested and tendered by the defendant to which the defendant excepted.

36. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving over the written objections of the defendant, Instruction No. 2 as requested and tendered by the Prosecuting Attorney for the 68th Judicial Circuit of Indiana:

37. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving over the written objections of the defendant, Instruction No. 6 as requested and tendered by the Prosecuting Attorney for the 68th Judicial Circuit of Indiana.

38. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving over the written objections of the defendant, Instruction No. 8 as re-

quested and tendered by the Prosecuting Attorney for the 68th Judicial Circuit of Indiana.

39. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving over the written objections of the defendant, Instruction No. 15 as requested and tendered by the Prosecuting Attorney for the 68th Judicial Circuit of Indiana.

40. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving over the written objections of the defendant, Instruction No. 18 as requested and tendered by the Prosecuting Attorney for the 68th Judicial Circuit of Indiana.

41. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving over the written objections of the defendant, Instruction No. 19 as requested and tendered by the Prosecuting Attorney for the 68th Judicial Circuit of Indiana.

42. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving, over the written objections of the defendant, Court's Instruction No. 2 as tendered and given by the Court on its own motion.

43. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving, over the written objections of the defendant, Court's Instruction No. 6 as tendered and given by the Court on its own motion.

44. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving, over the written objections of the defendant, Court's Instruction No. 7 as tendered and given by the Court on its own motion.

45. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving, over the written objections of the defendant, Court's Instruction No. 8 as tendered and given by the Court on its own motion.

46. Error of law occurring at the trial in this, to-wit:

That the Court erred in giving, over the written objections of the defendant, Court's Instruction No. 10 as tendered and given by the Court on its own motion.

47. That the verdict of the jury is contrary to law.

48. That the verdict of the jury is not sustained by sufficient evidence.

Court's Entry on Motion in Arrest of Judgment and For New Trial July 16, 1963—"Hearing on motion in arrest is waived by Defendant and State and the Court now over-rules Defendant's Motion in arrest of judgment and also over-rules his motion for new trial." (R. P. 261)

APPELLANT'S ASSIGNMENT OF ERRORS

(R. P. 1)

The Appellant, Ronald Richard Cichos, says there is manifest error in the judgment and proceedings, prejudi-

cial to the Appellant, Ronald Richard Cichos, in this cause, to-wit:

1. The Court erred in overruling the Appellant's motion for a new trial.

RONALD RICHARD CICHOS, Appellant

APPELLANT'S PETITION FOR REHEARING

The appellant in the above-entitled cause prays the Court to grant a rehearing in said cause; and to that end the appellant respectfully shows to the Court that it erred in the following respects, that is to say:

1. In its written opinion upon the decision of said cause, the Supreme Court of Indiana erred in that said Court failed to comply with the requirements of Article 7, Section 5, of the Constitution of the State of Indiana by failing in said written opinion to give a statement in writing, and the decision of the Court herein, of each question arising in the record of such case, in the following particulars, to wit:

A. Specifications 3 and 4 of the Appellant's Motion For New Trial are a part of the record of this case; the error assigned on this appeal is that the trial Court erred in over-ruling the Appellant's Motion for New Trial; Specifications 3 and 4 of the Appellant's Motion For New Trial were included in the Appellant's Brief On The Assignment of Errors as Point 1 of Proposition II thereof; the written opinion of the Supreme Court of Indiana did not give the decision of the Court therein.

B. Specification 5 of the Appellant's Motion For New Trial is a part of the record of this case; the Assignment of Errors on this appeal is that the trial Court erred

in over-ruling the Appellant's Motion For New Trial; Specification 5 of the Appellant's Motion For New Trial was included in the Appellant's Brief on the Assignment of Errors as Point 2 of Proposition II thereof; the written opinion of the Supreme Court of Indiana did not give the decision of the Court therein.

C. Specifications 12, 13, 15, 16, 18, 19, 20, 23, 24 and 35 of the Appellant's Motion For New Trial are a part of the record of this case; the Assignment of Errors on this appeal is that the trial Court erred in over-ruling the Appellant's Motion For New Trial; these specifications were included in the Appellant's Brief on the Assignment of Errors as Point 1 of Proposition III thereof; the written opinion of the Supreme Court of Indiana did not give the decision of the Court therein.

D. Specification 42 of the Appellant's Motion For New Trial is a part of the record of this case; the Assignment of Errors on the appeal of this cause is that the trial Court erred in over-ruling the Appellant's Motion For New Trial; this specification was included in the Appellant's Brief on the Assignment of Errors as Point 2, Proposition III thereof; the written opinion of the Supreme Court of Indiana did not give the decision of the Court therein.

E. Specification 47 of the Appellant's Motion For New Trial is a part of the record of this case; the Assignment of Errors on the appeal of this cause is that the trial Court erred in over-ruling the Appellant's Motion For New Trial; this specification was included in the Appellant's Brief on the Assignment of Errors as Point 1 of Proposition IV thereof; the written opinion of the Supreme Court of Indiana did not give the decision of the Court therein.

2. The Supreme Court of Indiana erred in holding in its written opinion upon the decision of this case that it

was not error for the trial Court to sustain the demurrer of the appellee to the Appellant's Verified Special Plea of Former Jeopardy for the reasons specified at Point 1 of Proposition I of the Appellant's Brief on the Assignment of Errors on the appeal of this cause.

Respectfully submitted,

Warren Buchanan
John B. McFaddin
Appellant's Attorneys

July ——, 1965

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~850~~ 45

RONALD R. CICHOS,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1965

No. 850

RONALD R. CICHOS,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

The petitioner has made no attempt to comply with Rule No. 23, 1(c), of the rules of the Supreme Court of the United States insofar as it requires that the question pre-

sented for review be "expressed in the terms and circumstances of the case." Not only has he stated a completely abstract question, but, moreover, an unintelligible question.[1]

It is only by reading petitioner's argument (under the heading "Reasons for Granting Writ," pp. 12-23) that one can understand that the question he is attempting to present to the Court for decision is this:

> Whether the double jeopardy clause of the Fifth Amendment is incorporated in the due process clause of the Fourteenth Amendment and, if so, whether the petitioner has been denied due process by the Indiana Supreme Court's affirmance of his conviction on a verdict of guilty of the offense of reckless homicide at a second trial on a two count affidavit charging reckless homicide in Count I and involuntary manslaughter in Count II on identical allegations of fact, an identical verdict having been rendered in his first trial on the same two counts, and the new trial having been granted on his motion.

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[1] The sole question stated is this: "1. Is the Constitutional right against double jeopardy guaranteed by the Fifth Amendment of such basic characteristic in the law so as to be immune from statute encroachment under the Fourteenth Amendment?" (Pet. p. 2).

SUMMARY OF ARGUMENT

1. The question of whether petitioner was ever in double jeopardy was mooted when the second trial's jury rendered a verdict identical to the first verdict set aside by the granting of petitioner's own motion for new trial.

2. The two offenses, reckless homicide and involuntary manslaughter, for which petitioner was twice tried on a two count affidavit are, in reality, one offense with alternative penalties. Petitioner's situation was exactly the same as that of a defendant charged in one count with one offense punishable by alternative penalties. It was, therefore, not double jeopardy to subject him, on the second trial, to the hazard of the more severe penalty which had been eliminated by the first verdict.

3. It is not an arbitrary rule of law applicable alike to all situations and to all multi-count indictments, that silence of the trial jury as to one count is equivalent to a verdict of not guilty on that count. It is only where logic permits and necessity requires that silence is so treated. When there is no need to presume any verdict at all, or when it would result in an inconsistency, silence is not tantamount to a verdict of not guilty.

4. An accusatory pleading charging two or more offenses consisting of different elements (whether in one count or two counts) is essential to the application of the double jeopardy rule in *Green v. United States,* 355 U.S. 184.

5. All the reasons stated in *Palko v. Connecticut,* 302 U.S. 319, for not considering the double jeopardy clause of the Fifth Amendment a part of the due process clause of the Fourteenth Amendment are reasons for not granting certiorari herein.

ARGUMENT

Respondent has rephrased, "in the terms and circumstances of the case," petitioner's "Question Presented," not only to make it intelligible, but also to emphasize that the case at bar is not a *Green* case.[2] The whole thrust of the petition herein is that petitioner's second trial violated the rule against double jeopardy enunciated in *Green*, which rule, he urges, should now be applied to the States by the overruling of *Palko v. Connecticut*, 302 U.S. 319.

Green was tried for first degree murder in the District of Columbia and found guilty of second degree murder. He appealed and the conviction was reversed. On the second trial he was found guilty of first degree murder. He again appealed and when the case reached this Court it was held that the first verdict was "an implicit acquittal on the charge of first degree murder."[3] Or " . . . that Green's jeopardy for first degree murder came to an end when the jury was discharged. . . ."[4] His appeal of the verdict of guilty of second degree murder was held not to constitute a waiver of that jeopardy[5] and his second trial for first degree murder was held to be contrary to the Fifth Amendment and the conviction was reversed.[6]

In the case at bar the petitioner was tried on a second amended affidavit in two counts alleging identical facts of a fatal automobile collision. Count I charges the offense of reckless homicide and Count II charges the offense of

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[2] *Green v. United States*, 355 U.S. 184.
[3] 355 U.S. at 190.
[4] 355 U.S. at 191.
[5] 355 U.S. at 191.
[6] 355 U.S. at 198.

involuntary manslaughter.[7] The jury's verdict was guilty on Count I (reckless homicide) and silent as to Count II (involuntary manslaughter). A new trial was granted on appeal and an identical verdict reached on the second trial, i.e., guilty on Count I and silent as to Count II.[8]

If it was putting petitioner in double jeopardy to try him a second time on the charge of involuntary manslaughter, such error was rendered harmless when petitioner was not found guilty of that charge on the second trial. The question, then, of whether the second trial was double jeopardy is moot.

That this Court will not decide moot questions probably needs no citation of authority and certainly needs no argument. But because a hasty reading of the Indiana Supreme Court's opinion, especially its somewhat confusing dicta, may suggest that its affirmance of petitioner's conviction rests on its decision that the Fifth Amendment's prohibition of double jeopardy is not a part of the due process required of the States by the Fourteenth Amendment, respondent cites *Oil Workers Union v. Missouri*, 361 U.S. 363, as authority that this Court will not review a State supreme court's decision of a moot question.

Notwithstanding the fact that the Indiana Supreme Court's opinion states that "[a]ppellant urges that the trial court committed reversible error by permitting the state to prosecute him a second time for either involuntary manslaughter or reckless homicide,"[9] respondent does not understand that petitioner is here asserting that retrial on

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[7] Petition, p. 2; Petition's Appendix, pp. 16-21.
[8] Ibid.
[9] Appendix to Petition, p. 2.

the reckless homicide charge was double jeopardy, or that such a contention was ever properly before the Supreme Court of Indiana for decision. His statement of the record clearly shows that the only double jeopardy error he assigned in the Indiana Supreme Court relates solely to his retrial on the involuntary manslaughter charge. In his "Statement" he contends that the question of former jeopardy under the United States Constitution was presented to the trial court by 1) his special plea[10] and the State's demurrer[11] thereto, 2) the fifth reason in his motion for directed verdict at the conclusion of the State's evidence[12] and the peremptory instruction No. B[13] tendered therewith, and 3) the fifth reason of his motion for directed verdict at the conclusion of all the evidence[14] and the peremptory instruction No. B[15] tendered therewith. All of these documents contend that the petitioner cannot be tried the second time on Count II's charge of involuntary manslaughter (although neither says that such second trial violates the United States Constitution), but none of them contend that the second trial on the charge of reckless homicide was error. The sustaining of the demurrer to the special plea of former jeopardy as to Count II, and the overruling of the two motions for directed verdicts, were the only specifications of error with respect to contentions of former jeopardy which petitioner made in his motion for new trial.[16] The overruling of the motion for new trial

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[10] Quoted on pp. 3-6 of his Petition.

[11] Petition's Appendix, pp. 21-22.

[12] Quoted on pp. 6-7 of his Petition.

[13] Petition's Appendix, p. 25.

[14] Quoted on page 7 of his Petition.

[15] Petition's Appendix, p. 27.

[16] Petition's Appendix, pp. 30-43, specifications 2 (p. 30), 6 (p. 35) and 7 (p. 36). Petitioner claims no more. See last sentence of page 7 of Petition and quotations from motion for new trial which follow on pp. 8 and 9.

was the only error assigned in his appeal to the Indiana Supreme Court.[17] Therefore, the only double jeopardy question which petitioner claims to have brought to the Supreme Court of Indiana is whether his second trial for involuntary manslaughter violates the Fourteenth Amendment.[18] And that question has been mooted by the second verdict.

In doing his best to bring the instant case within one of the categories mentioned in Rule 19, 1(a), as the type of state court decision this Court may consider for review on petition for writ of certiorari, petitioner has made a valiant effort to show that the time is now ripe for overruling the holding of *Palko v. Connecticut,* 302 U.S. 319, that the Fifth Amendment's guarantee against double jeopardy (at least in all its aspects) does not apply to State criminal prosecutions. But even if this Court agrees with that argument and is now ready to overrule *Palko,* it must first find a case in

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[17] Petition, p. 9; Petition's Appendix, pp. 43-44.

[18] Petitioner says, on page 7 of his Petition, that after the verdict he again raised the double jeopardy question by his Motion in Arrest f Judgment. This motion is printed at pages 28-30 of the Petition's Appendix and does state as a part of ground 3 that entry of judgment on the verdict of guilty to Count I would violate the rule against double jeopardy because of its inconsistency with the prior and simultaneous implied verdicts of not guilty to Count II. The overruling of this motion, however, was not assigned as error, either independently or by inclusion in the subsequent motion for new trial. Whether failure to assign error based on this contention was due to the fact that it is not a statutory ground for motion in arrest of judgment (Burns IND. STAT. ANN., § 9-2001) or was due to the absurdity of the idea that silence as to Count II implies a not guilty finding which should outweigh an express verdict of guilty on Count I (assuming that guilt on I and innocence on II is inconsistent) or was due to some other reason, is immaterial. It was not assigned as error and no question was ever before the Indiana Supreme Court, and consequently no question is here presented to this Court, as to whether it was double jeopardy (and a denial of due process?) to try petitioner the second time on Count I (reckless homicide).

which a defendant has been convicted in violation of some federal rule against double jeopardy. Petitioner realizes as much and that is the reason he is contending the case at bar violates the rule in *Green*. Respondent has already shown that if the retrial did violate that rule, the error was mooted by the jury's verdict in that second trial. Respondent will now show that the retrial did not violate the rule announced in *Green* and could not be the vehicle for extending *Green* to state court prosecutions in any event.

All similarities between this case and the *Green* case are purely superficial and entirely unreal, as will be shown by petitioner's own arguments.

Respondent fully agrees with petitioner's repeated statements that the two offenses, reckless homicide and involuntary manslaughter, as here charged, are identical,[19] save for difference in penalty. Respondent also agrees that the Supreme Court of Indiana so held in its decision which petitioner here seeks to reverse.[20] And that is the very reason (aside from the rule of *Palko* and the fact that petitioner was never convicted on Count II, involuntary manslaughter) that we do not have here a state court decision of a federal question of substance.

The 1881 and 1905 statutory definitions of manslaughter, both voluntary and involuntary, in Indiana, were said to be, word for word, Blackstone's definition of the common law crime of manslaughter and at least since 1905 the pen-

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[19] This statement is found, in substance, on pages 14, 15, 16 and 22 of the Petition. Obviously, of course, identity exists only in cases where the offenses are committed by vehicle.

[20] Petition, p. 15.

alty has been imprisonment for 2 to 21 years.[21] The present 1941 statute[22] varies slightly from Blackstone's definition,[23] and still carries a penalty of 2 to 21 years. The first and only reckless homicide statute was enacted in 1939 as a part of one section, § 52, ch. 48, Acts of 1939 (Burns IND. STAT. ANN. § 47-2001) given by § 169 (Burns IND. STAT. ANN. § 47-2313) the short title "Uniform Act Regulating Traffic on Highways."[24]

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[21] *State v. Dorsey,* 118 Ind. 167, 168 (1889); *Dunville v. State,* 188 Ind. 373, 375.

[22] Burns IND. STAT. ANN. § 10-3405, reads: "Whoever voluntarily kills any human being without malice, expressed or implied, in a sudden heat, or involuntarily in the commission of some unlawful act, is guilty of manslaughter, and on conviction shall be imprisoned not less than two [2] years nor more than twenty-one [21] years."

[23] " 'The unlawful killing of another without malice express or implied; which may be either voluntarily, upon a sudden heat; or involuntarily but in the commission of some unlawful act.' " *State v. Dorsey,* 118 Ind. 167, 168, quoting Blackstone's Commentaries, Book 4, p. 191.

[24] § 52 reads: "(a) Reckless Homicide. Any person who drives a vehicle with reckless disregard for the safety of others and thereby causes the death of another person shall be guilty of the offense of reckless homicide. Any person convicted of reckless homicide shall be punished by a fine of not less than one hundred dollars [$100] or more than one thousand dollars [$1,000], or by imprisonment in the state farm for a determinate period of not less than sixty [60] days and not more than six [6] months, or by both such fine and such imprisonment, or by a fine of not more than one thousand dollars [$1,000] and imprisonment in the state prison for an indeterminate period of not less than one [1] year or more than five [5] years.

"(b) Driving While Under the Influence of Intoxicating Liquor or Narcotic Drugs. Any person who drives a vehicle while such person is under the influence of intoxicating liquor or of narcotic drugs shall be guilty of a criminal offense. Upon a first conviction, such person shall be punished by a fine of not less than ten dollars [$10.00] nor more than one hundred dollars [$100] or by imprisonment in the county jail or state farm for a determinate period of not less than ten [10] days nor more than six [6] months, or by both such fine and imprisonment. Upon a second or subsequent conviction, such person shall be punished by a fine of not more than one hundred dollars [$100] and imprisonment in the state farm for a determinate period of not more than one [1] year, or by a fine of not more than five hundred dollars [$500] and imprison-

Since no records of committee discussion or floor debate are kept by the Indiana General Assembly, and committee reports are devoid of explanation or other detail, there is no authoritative key to the Legislature's purpose in 1939 in creating a second identical offense when "the unlawful killing of another without malice express or implied . . . [was done] involuntarily in the commission of . . . [the] unlawful act"[25] of "driv[ing] a vehicle with reckless dis-

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ment in the state prison for an indeterminate period of not less than one [1] year or more than three [3] years.

"(c) Reckless Driving. Any person who drives a vehicle with reckless disregard for the safety, property or rights of others shall be guilty of the offense of reckless driving. Any person convicted of reckless driving shall be punished by a fine of not less than one dollar [$1.00] nor more than fifty dollars [$50.00], or by imprisonment in the county jail or state farm for a determinate period of not less than ten [10] days nor more than six [6] months, or by both such fine and such imprisonment.

"The offense of reckless driving, as defined in this section, may be based, depending upon the circumstances, on the following enumerated acts and also on other acts which are not here enumerated, but are not excluded and may be within the definition of the offense: (1) driving at such an unreasonably high rate of speed, or at such an unreasonably low rate of speed, under the circumstances, as to endanger the safety or the property of others, or as to block the proper flow of traffic; (2) passing or attempting to pass another vehicle from the rear while on a slope or on a curve where vision ahead is obstructed for a distance of less than five hundred [500] feet ahead; (3) driving in and out of a line of traffic, except as permitted elsewhere in the laws of this state; (4) speeding up or refusing to give half of the roadway to a driver overtaking and desiring to pass; (5) failing to dim bright or blinding lights when meeting another vehicle or pedestrian; (6) driving recklessly against another person or against the car or other property of another; or driving in any other specified manner in which the driver is heedless of probable injury to the safety, the property or the rights of others."

[25] The quoted words are from Blackstone's definition of manslaughter quoted *supra* in full in note 23. In 1939 Indiana's manslaughter statute read as follows: "Whoever unlawfully kills any human being without malice, express or implied, either voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act, is guilty of manslaughter, and, on conviction, shall be imprisoned in the state prison not less than two years, nor more than twenty-one years." (Acts, 1905, ch. 169, § 351.)

regard for the safety of others,"[26] except such as may be apparent on the face of the Act. That the Legislature was aware, however, that the new offense of reckless homicide was identical to the already existing offense of involuntary manslaughter (when committed by driving a vehicle) is made plain by the provisions of § 53 (Burns IND. STAT. ANN. § 47-2002) which reads as follows:

> "Provisions for Proceedings Under Sec. 52. All proceedings under Sec. 52 of this act shall be subject to the following provisions:
>
> "(1) Each of the three offenses defined in this section is a distinct offense. No one of them includes another, or is included in another one of them. Sec. 52, subsection (a), in creating the offense of reckless homicide, does not modify, amend or repeal any existing law, but is supplementary thereto and to the other sections of this act. All three of the offenses, or any two of them, may be joined in separate counts in the same indictment or affidavit. One or more of them may be joined in separate counts with other counts alleging offenses not defined in this section, such as involuntary manslaughter, if the same act, transaction or occurrence was the basis for each of the offenses alleged. With respect to the offenses of reckless homicide and involuntary manslaughter, a final judgment of conviction of one of them shall be a bar to a prosecution for the other; or if they are joined in separate counts of the same indictment or affidavit, and if

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In 1941, the 1905 Act was replaced by the statute in effect at the time of the vehicular collision for which petitioner was prosecuted, which new Act is set out in full in note 22, *supra*. Again, we see no reason for the slight change in wording which appears to have changed the meaning not at all.

[26] These last quoted words are the "unlawful act" of the reckless homicide statute. See *State v. Beckman*, 219 Ind. 176, 182, 37 N.E. 2d 531, 533, discussed infra at p. 12.

there is a conviction for both offenses, a penalty shall be imposed for one offense only."

The only logical deduction of legislative intent to be drawn from the provisions of § 53 (Burns § 47-2002), as they apply to involuntary manslaughter and reckless homicide by vehicle, is that the 1939 Legislature wanted to provide, by the enactment of the reckless homicide provisions of § 52 (Burns § 47-2001) more flexibility in the punishment which might be meted out to those who kill by the unlawful act of recklessly driving a vehicle.[27]

It may be conceded, *arguendo,* that the Indiana Supreme Court may not avoid the double jeopardy question merely by holding reckless homicide and involuntary manslaughter by vehicle to be identical offenses if they are not truly identical. The Indiana cases cited by petitioner on pages 14 and 15 of his petition, however, clearly show that Indiana has always interpreted its reckless homicide statute as requiring for conviction of that offense, the same proof of the same ultimate facts as are essential to a conviction of involuntary manslaughter by vehicle.

Shortly after it was enacted, the reckless homicide statute was challenged in *State v. Beckman,* 219 Ind. 176, 37 N.E. 2d 531 (1941) on the ground that the offense was not described by the statute with sufficient certainty. Acknowledging that public offenses must be so described so that

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[27] Indiana's indeterminate sentence law, Ind. Acts of 1929, ch. 200, Burns IND. STAT. ANN., §§ 9-1819 through 9-1821, renders the 2 to 21 years penalty prescribed in the manslaughter statute an inflexible penalty of 21 years, so far as the prosecutor, grand jury, petit jury, and judge are concerned. If an executed sentence is imposed, it must be for 2-21 years imprisonment and only the parole authorities decide how much of it, in excess of the minimum, must be served in prison.

people may know in advance whether what they are about to do or fail to do is criminal, the court held such requirement to be met " 'if the legislature uses words having a common-law meaning or a meaning made definite by statutory definition or previous statutory construction. . . .' " It then said:

> "It is clear that the statute does not fall in that class where the Legislature may be said to have bodily adopted the common-law definition of a crime, such as sometimes results from the use of such terms as 'arson,' 'adultery,' 'bigamy,' 'larceny,' etc. But it does not follow that the phrase 'reckless disregard for the safety of others' did not have a definite meaning at common law. It was said in *State v. Dorsey* (1889), 118 Ind. 167, 168, 169, 20 N.E. 777, 778, 10 Am.St.Rep. 111, 112, 113:
>
> > " 'The common law definition of manslaughter, as given by Blackstone, is as follows: "The unlawful killing of another without malice express or implied; which may be either voluntarily, upon a sudden heat; or involuntarily, but in the commission of some unlawful act."
> >
> > " '. . . To constitute manslaughter the act causing death must be of such a character as to show a wanton or reckless disregard of the rights and safety of others, but not necessarily an act denounced by the statute as a specific crime.'
>
> Our involuntary manslaughter statute follows the common-law definition of manslaughter, § 10-3405, Burns' 1933, § 2408, Baldwin's 1934. It will thus be seen that the statutory definition of reckless homicide is as specific in its descriptive terms as that defining involuntary manslaughter. Indeed, as a matter of statutory definition, the former is more certain than the latter, since 'reckless disregard for the safety of others' is more restricted in its mean-

ing than an 'unlawful act,' although the terms may be judicially interpreted as meaning the same things in particular statutes.

"In *Smith v. State* (1917), 186 Ind. 252, 259, 115 N.E. 943, 946, the indictment charged that the defendant unlawfully drove a motor vehicle over a public street in a reckless and wanton manner, without regard for the safety of others, and at a high and reckless rate of speed. The court said:

> " 'This count of the indictment charges appellant with gross carelessness in the operation of his automobile and is clearly sufficient under the rule that a negligent act which shows a wanton and reckless disregard for the rights and safety of others, and which causes the death of another, will constitute manslaughter.'

"In *Minardo v. State* (1933), 204 Ind. 422, 429, 430, 183 N.E. 548, 550, 551, the defendant was charged with having driven an automobile at a greater rate of speed than was permitted by law, and also at a speed 'greater than was reasonable and prudent having regard to the traffic and the use of said highway then and there existing, and which said rate of speed was then and there such as to endanger the life and limb of any person using said highway.' The court said:

> " 'In our opinion the charge is not limited to the alleged violation of the speed limit statute, but it especially covers the driving of an automobile under circumstances showing a willful and reckless disregard for the life and limb of other persons. The traffic on the road; the driving experience of appellant; whether or not the three seated in the car interfered with the driver's control thereof; the position of the car at the time of the collision with reference to the center of the road; the weight of the car, the condition of its

brakes and the effectiveness of its headlights were evidentiary circumstances proper to be considered in determining the essential fact of whether or not appellant was guilty of wanton and reckless driving. . . .'

"The case of *Armstrong v. Binzer* (1936), 102 Ind. App. 497, 504, 506, 507, 199 N.E. 863, 865, 867, involved the meaning of the words 'reckless disregard of the rights of others,' found in a statute relating to civil liability growing out of the operation of an automobile. The Appellate Court said:

" 'The statute does not attempt to define the meaning of the phrase "reckless disregard of the rights of others," but does, by such phrase, fix a standard of conduct which, if not observed, will result in liability for damages sustained, without, however, undertaking to apply that standard to any given state of facts, thus leaving the question as to what constitutes a reckless disregard of the rights of others open for determination as a question of fact when the evidence is conflicting, or when the evidence is conflicting, or when different inferences from the evidence may be reasonably drawn.'

The following instruction was approved as a correct statement of the law:

" ' ". . . It is proper, therefore, for the court to define the term 'reckless disregard of the rights of others.'

" ' "Reckless disregard of the rights of others, as used in the Indiana Guest Statute, means where the owner or operator of an automobile voluntarily does an improper or wrongful act, or with knowledge of existing conditions, voluntarily refrains from doing a proper and prudent act, under circumstances when his action, or his

failure to act, evinces an entire abandonment of any care, and a heedless indifference to results which may follow, and he recklessly takes the chance of an accident happening without intent that an accident may occur.'' '

There was a petition to transfer, based on the ground that the above opinion erroneously decided a new question of law, which this court denied prior to the enactment of chapter 48, Acts of 1939, and it is proper to presume that the General Assembly had that fact in mind when the statute here under consideration was enacted.

"It is our view that the part of the statutory definition of reckless homicide which makes it unlawful to driver a motor vehicle with reckless disregard for the safety of others is sufficiently definite to describe a public offense, and in this conclusion we are supported by the following cases from other jurisdictions: *State v. Sheaffer* (1917), 96 Ohio St. 215, 117 N.E. 220, L.R.A. 1918 B 945 Ann. Cas. 1918 E 1137; *People v. Green* (1938), 368 Ill. 242, 13 N.E. (2d) 278, 115 A.L.R. 348; *People v. Smith* (1939), 36 Cal. App. (2d) 748, 92 P. (2d) 1039; *People v. Gardner* (1939), 255 App. Div. 683, 8 N.Y.S. (2d) 917.

"Involuntary manslaughter does not belong to that class of crimes that may be charged in the language of the statute. When the affidavit or indictment is based upon the commission of an act which is unlawful because it is negligent, the allegations must allege facts by which it is made to appear that the act was done wantonly or with reckless disregard for the safety of others, and it must further appear that such act was the proximate cause of the death. In *Potter v. State* (1904), 162 Ind. 213, 70 N.E. 129, 64 L.R.A. 942, 102 Am. St. Rep. 198, 1 Ann. Cas. 32, it was held to be necessary to a charge of manslaughter that the death of the decedent be made to

> appear the natural or necessary result of the unlawful act relied upon and that it was insufficient to charge that the killing occurred 'while' the defendant was doing the unlawful act. The charge is not aided by the allegation, by way of conclusion, that the act was done with wanton and reckless disregard for the safety of others, *Kimmell v. State* (1926), 198 Ind. 444, 154 N.E. 16. The rules stated above must be held equally applicable to the charge of reckless homicide."

Later on, in *Rogers v. State,* 227 Ind. 709, 715, 88 N.E. (2d) 755, 758, (1949), it was expressly stated that "[r]eckless homicide, under the statute [Burns IND. STAT. ANN., § 47-2001] . . . is a form of involuntary manslaughter. . . ." Several involuntary manslaughter cases were cited to support the holding that the commission of other crimes, such as driving under the influence of alcohol, could be alleged as constituting reckless disregard for the safety of another.

In *Ray v. State,* 233 Ind. 495, 120 N.E. (2d) 176, 121 N.E. (2d) 732, appellant had been convicted of involuntary manslaughter on a two count indictment charging involuntary manslaughter and reckless homicide. He then challenged the sufficiency of the involuntary manslaughter count for reasons stated by the court thus:

> "'The appellant contends that the reckless homicide statute upon which count two of the indictment is based is specific, includes all the elements necessary to prove the more general offense of involuntary manslaughter, and so only the reckless homicide statute is presently in effect. Since count one of the indictment (involuntary manslaughter) was based upon driving an automobile while under the influence of intoxicating liquor as the

proximate cause of death, and wholly fails to charge facts constituting the offense of reckless homicide, the appellant insists count one of the indictment was insufficient."

The Court answered that argument—without even suggesting that the reckless homicide statute does not, or may not, in fact, "include . . . all the elements necessary to prove the more general offense of involuntary manslaughter. . . ." The Court's answer was merely to quote Burns IND. STAT. ANN., § 47-2002,[28] apparently for that part of that statute which says: "Section 52, subsection (a), in creating the offense of reckless homicide, does not modify, amend or repeal any existing law, but is supplementary thereto. . . ."

The constitutionality of the mechanics, or the means, employed by the Legislature in creating this flexibility of punishment are not here in dispute. The Legislature could have merely changed the penalty provisions of the manslaughter statute to provide the judge or jury with the same range of penalty alternatives on a charge of manslaughter by vehicle as was provided to the jury in this case by the fact that petitioner was charged with reckless homicide in Count I and involuntary manslaughter in Count II. If that had been done in 1939, instead of the method chosen by the Legislature, the jury trying petitioner would have had exactly the same discretion it did have. So far as petitioner is concerned there is aboslutely no difference in the two methods.

The possibility that other accused persons charged only with involuntary manslaughter may not have the advantage

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[28] Printed herein at p. 11, ante.

of alternative penalties accorded to petitioner by charging him in a two-count affidavit with two identical offenses obviously is no concern of petitioner.[29] And the fact remains that petitioner here went to trial, both on his first and his second trial, in exactly the same position as any other defendant who is accused of an offense for which alternative penalties are prescribed.

If petitioner had been charged in Indiana with felony-murder, as was *Green* in the District of Columbia, he could have been found guilty, like *Green*, of only one offense: First degree murder.[30] But in Indiana, unlike the District of Columbia, when a defendant allegedly murders by arson, the jury has the option, in any guilty verdict, of stating whether the punishment to be inflicted[31] should be death or life imprisonment.[32] In analogous principal, petitioner's situation was no different when he was tried on the two-

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[29] Whether, as petitioner charges on page 16 of his petition, the method the Indiana Legislature chose to give petitioner's jury alternative penalties it could impose (for what he there concedes is "in reality the same offense") is unique is not only doubtful, but irrelevant. No research to discover whether this provision of Indiana's "uniform" act is also "uniform" in other states or unique to Indiana is deemed necessary for this brief. Instead of complaining of being "subjected in one trial to two counts," petitioner should thank the prosecutor for including the count charging reckless homicide. If the prosecutor had chosen to charge only the one count of involuntary manslaughter the petitioner could now well be serving a 2-21 year sentence instead of appealing a 1-5 year sentence.

[30] It is one of the strange quirks of the *Green* case that his first conviction of second degree murder was reversed by the Court of Appeals because the District Court had erroneously permitted the jury to return a verdict of second degree murder on evidence which would permit only verdicts of either guilty or not guilty of first degree murder. 95 U.S. App.D.C. 45, 218 F.2d 856.

[31] Burns IND. STAT. ANN., § 9-1819.

[32] Burns IND. STAT. ANN., § 10-3401.

count charge of the two identical offenses of reckless homicide and involuntary manslaughter.

If petitioner had been tried on a charge of felony-murder, found guilty with life imprisonment as the punishment, appealed, and granted a new trial because of an erroneous instruction, would it be held that he could not again be tried for felony-murder because of the possibility that the second jury, although properly instructed, might not only find him guilty of the same offense the first jury found him guilty of, but might assess the greater punishment of the death penalty?

This Court said no to that question in *Stroud v. United States,* 251 U.S. 15, even though Stroud was given the death penalty on the last trial.[33] *Stroud* was tried three times on a single count indictment charging first degree murder in a federal prison. Under the federal statute involved in that case, the jury was permitted, by the form of its verdict, to fix the punishment to be imposed by the court, which could be either life imprisonment or hanging. The first trial resulted in a sentence of death, reversed on Stroud's appeal. The second trial also resulted in a verdict of guilty of first degree murder but "without capital punishment." This was also reversed on Stroud's appeal and the third trial resulted in a third verdict of guilty and the sentence of death was imposed.

This Court, by Mr. Justice Day, said:

> "It is alleged that the last trial of the case had the effect to put the plaintiff in error twice in

[33] If he had been given a life sentence the question would have been moot—as it is in the case at bar—and would not have been considered.

jeopardy for the same offense in violation of the Fifth Amendment to the Constitution of the United States. From what has already been said it is apparent that the indictment was for murder in the first degree; a single count thereof fully described that offense. Each conviction was for the offense charged. It is true that upon the second trial the jury added 'without capital punishment' to its verdict, and sentence of life imprisonment was imposed. * * * The fact that the jury may thus mitigate the punishment to imprisonment for life did not render the conviction less than one for first degree murder. *Fitzpatrick v. United States*, 178 U.S. 304, 307.

"The protection afforded by the Constitution is against a second trial for the same offense. *Ex parte Lange*, 18 Wall. 163. *Kepner v. United States*, 195 U.S. 100, and cases cited in the opinion. Each conviction was for murder as charged in the indictment which, as we have said, was murder in the first degree. In the last conviction the jury did not add the words 'without capital punishment' to the verdict, although the court in its charge particularly called the attention of the jury to this statutory provision. In such case the court could do no less than inflict the death penalty. Moreover, the conviction and sentence upon the former trials were reversed upon writs of error sued out by the plaintiff in error. The only thing the appellate court could do was to award a new trial on finding error in the proceeding, thus the plaintiff in error himself invoked the action of the court which resulted in a further trial. In such cases he is not placed in second jeopardy within the meaning of the Constitution. *Trono v. United States*, 199 U.S. 521, 533."[34]

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[34] The fact that *Trono*, which was rejected as controlling precedent in *Green* (355 U.S. at 197) is cited here as authority does not in any way weaken the distinction between *Stroud* and *Green*. At the foot of page 195 of 355 U.S., as part of footnote 15 beginning on page 194, it

The mere fact that the one offense with two alternative penalties is stated in one statute and charged in one count, as in *Stroud* (as it would also be in any felony-murder case in Indiana), is entirely irrelevant so far as the analogy between *Stroud* and the case at bar is concerned. This is the "other side of the coin" seen in footnote 10, 355 U.S. at 190, which reads:

> "In substance the situation was the same as though Green had been charged with these different offenses in separate but alternative counts of the indictment. The constitutional issues at stake here should not turn on the fact that both offenses were charged to the jury under one count."

This brings the argument full circle to petitioner's basic premise that the jury's failure to return any verdict whatsoever on the involuntary manslaughter count in the first trial is a verdict of not guilty, by implication.[35] Whether such verdict is implied solely by the jury's silence on that count or by their silence coupled with their express verdict of guilty of the other count, he does not say. But in any event the claim that such a verdict must be inferred appears to be based solely on the authority of the Indiana cases cited by the Indiana Supreme Court in that part of its opinion printed at the foot of page 2 and the top of page 3 of the petition's appendix.[36] Those cases are all based on

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was said: *"Stroud v. United States,* 251 U.S. 15, is clearly distinguishable [from *Trono*]. In that case a defendant was retried for first degree murder after he had successfully asked an appellate court to set aside a prior conviction for that same offense."

[35] Paragraph 5 of special plea of former jeopardy. Petition, p. 5.

[36] The last two sentences of the paragraph of the opinion which follows the citations are misprinted in the appendix. In 208 N.E.2d 685, 687, 6 Ind. Dec. 1, 2, those sentences read:

". . . In the leading case of *Weinzorpflin v. State, supra,* [7 Blackf. (Ind.) 186 (1844)] the doctrine of silence being equivalent to an ac-

the precedent of *Weinzorpflin v. State*, 7 Blackf. 186 (1844), in which a defendant, in an appeal from his first and only trial in which the jury had found him guilty on only one count of a three count indictment, contended he was entitled to a verdict on the other two counts. The holding of *Weinzorpflin* on this point was essentially the holding of this Court in *Green* to the effect of the jury's silence as to the defendant's guilt of the offenses charged but not mentioned in the verdict: It makes no difference; "the defendant has once been put in jeopardy . . . [and] can plead these proceedings in bar of a future prosecution. . . ."[37] Unlike *Green*, however, *Weinzorpflin* was not concerned (and had no reason to be concerned) with whether that jeopardy on the second and third counts could have been pleaded in a later trial after the setting aside of the guilty verdict on the defendant's motion. *Weinzorpflin* was concerned only with whether the defendant was adequately protected against a new prosecution while the guilty verdict stood. There was no question but that the guilty verdict protected defendant against another prosecution for the same offense charged in the count to which that verdict related. But the court said, on page 193 of 7 Blackford, ". . . we can not judicially know that the offenses charged in the three counts constituted but one transaction." Hence, the Court was not in the position of the federal court in *The United States v. Keen*, 1 McLean's R., 429, which "judicially knew that the five counts were for the same

---

quittal was promulgated with reference to the common law doctrine that a jury could not be dismissed until a verdict was returned. That case, however, distinguishes its facts from a situation where the court could judicially know that the multiple counts were merely different charges of the same offenses."

[37] Quotes from 7 Blackf. 194. The equivalent holding in *Green* is at p. 191 of 355 U.S.

offenses, varied so as to meet the proofs, and that consequently *a conviction on one count was a conviction on all,* and would bar a future prosecution for the same offense."[38] It is obvious, therefore, that the silence of a jury as to any one count of a multiple count indictment or affidavit can imply either a verdict of guilty or a verdict of not guilty depending on the logic of the particular case, and what the court in such case can judicially know about the identity or mutual exclusiveness of the two counts. And in the case at bar there is no logical reason for inferring that the jury's silence on the manslaughter count of the affidavit was a finding that he was not guilty of all the elements of involuntary manslaughter when, at the same time, the jury found him guilty of all those same elements—neither more nor less—in finding him guilty of reckless homicide. Even petitioner himself contends that a verdict of guilty of Count I and not guilty of Count II is an inconsistent verdict, yet maintains that Indiana precedent requires that silence be presumed to be "what is legally an acquittal."[39]

The Indiana Supreme Court did not refuse to concede, as contended by petitioner, that there is an abundance of Indiana authority which "holds that silence on a criminal charge [is] tantamount to acquittal."[40] As petitioner so inconsistently states, that Court did recognize that authority and returned to the logic of the *Weinzorpflin* case by holding:

> "Rather than treat the silence of the jury in the involuntary manslaughter count in this case as an acquittal, the better result would seem to be to hold

---

[38] The words quoted are from Weinzorpflin, 7 Blackf. at 192-3 (and not from *U. S. v. Keen, supra*) with emphasis added.

[39] Petition, page 16.

[40] Petition, pp. 15-16.

> that the reckless homicide verdict encompassed the elements of involuntary manslaughter, and that appellant was simply given the lesser penalty."[41]

And further:

> "Aside from the obvious fact that the Green case, *supra,* [355 U.S. 184] involved the application of federal law and federal standards, *there is the distinction concerning the character of the charges twice in issue.* The offenses here involved are statutorily treated more as one offense with different penalties rather than viewing reckless homicide as an included offense in involuntary manslaughter. [Emphasis added.]
>
> "Since the elements of both counts are almost identical, it is recognized that a verdict of guilty of reckless homicide does not logically exclude the possibility of such a verdict on the charge of involuntary manslaughter for constitutional reasons as would be the case when a conviction is had on a lesser included offense. See Burns' Ind. Stat. Anno. § 47-2002 (1952 Repl.)."[42]

The analogy of the case at bar to *Stroud* and its distinguishment from *Green* could be further belabored, but respondent believes the point has been made.

There is, of course, at least one other reason for not granting a writ on this petition: The holding of this Court in *Palko v. Connecticut, supra* [302 U.S. 319], conceded by petitioner to be "an obstacle."[43] Most of the petition for

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[41] As quoted from pp. 3-4 of the Petition's Appendix; p. 3 of 6 Ind. Dec., p. 687 of 208 N.E.2d.

[42] As quoted from pp. 6-7 of the Petition's Appendix, p. 5 of 6 Ind. Dec., and pp. 688-89 of 208 N.E.2d.

[43] Petition, p. 21.

the writ (whether expressly so or not) is an argument for the overruling of *Palko*. Respondent has chosen not to join that argument at this time, preferring to concentrate on the more obvious arguments which make it clear that the question of whether the rule of *Palko* should continue to be the law of the land is not an issue in this case. While respondent cannot envision this case as the vehicle for "revisiting" *Palko*, the granting of a writ of certiorari in this case would, in respondent's understanding, amount to that—and no more.[44] In that event, if respondent understands certiorari practice, he may again urge in his brief on the merits, as reasons for affirming the State court judgment or as reasons for dismissing the writ as improvidently granted, any of the reasons stated herein why the writ should not be granted and, on the merits, any reason for the affirmance of the judgment below, whether or not it may have been mentioned in this brief. But because of the annotation to Rule 24, Rules of the Supreme Court of the United States as published in 28 U.S.C.A. construing *Wiener v. United States*, 357 U.S. 349, as holding that a contention not raised in opposition to petition would not be considered by this Court, respondent wishes to go on record at this time as relying on every reason stated in *Palko* as argument that this Court should not hold that the due process clause of the Fourteenth Amendment prohibits the double jeopardy which petitioner contends occurred in his case.

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[44] Which is to say, the granting of the writ would not be the overruling of *Palko*, but merely the court's decision to consider whether it should overrule *Palko*.

CONCLUSION

The petitioner has attempted, but failed, to show by his petition that his second trial violated the rule against double jeopardy enunciated in *Green v. United States, supra* [355 U.S. 184] and that this Court should now "revisit" *Palko v. Connecticut, supra* [302 U.S. 319], overrule it, and extend the Sixth Amendment's double jeopardy prohibition to State criminal prosecutions. His petition should be denied not only because he has thus failed to show that he was ever in double jeopardy (even by the rule of *Green*), but also because the question of whether he was ever tried a second time for the same offense was mooted by the second verdict.

Respectfully submitted,

JOHN J. DILLON
Attorney General,
State of Indiana

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IN THE

Supreme Court of The United States

October Term, 1966

No. 45

RONALD R. CICHOS,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Indiana entered on July 6, 1965 is reported at 208 N. E. 2d 685, and is, as yet, unreported in the official Indiana Reports. The opinion

on rehearing rendered October 1, 1965, also officially unreported, is found in 210 N. E. 2d 363.

JURISDICTION

The judgment of the Supreme Court of Indiana was made and entered on July 6, 1965. A copy of such was appended to Petitioner's Appendix to the Petition for Writ of Certiorari at page 1 and has been printed as a part of the Record in this cause. The petition for rehearing was denied with an opinion by the Supreme Court of Indiana on October 1, 1965. It was also appended to the Petitioner's Appendix at page 8 and has aso been printed as a part of the Record. The Petition for Writ of Certiorari was filed December 27, 1965 with the Cerk of the Supreme Court of the United States. On April 4, 1966, this Court issued an order granting the petition for writ of certiorari and placing the same on the summary calendar. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth and Fourteenth Amendments to the Constitution of the United States involved in this appeal and Burns' Indiana Statutes Ann. Sec. 9-1901, 9-1902 are set forth in the Appendix hereto at pp. 2 and 3. The statutes under which Petitioner was charged, Burns' Ind. Stat. Ann. Sec. 47-2001(a) and Sec. 10-3405 are also set forth in the Appendix at p. 3.

QUESTIONS PRESENTED

The instant case presents the question as to whether the Constitutional protection against double jeopardy as guaranteed by the Fifth Amendment is of such basic characteristic in the law as to be immune from state encroachment

under the Fourteenth Amendment and whether such protection precludes retrial on a second charge for which an accused has been acquitted, after a successful appeal of a first charge.

STATEMENT

This criminal action was brought against Petitioner upon a second amended affidavit, charging the offense of involuntary manslaughter, Burns' Ind. Stat. Ann. Sec. 10-3405 and reckless homicide, Burns' Ind. Stat. Ann. Sec. 47-2001(a). The cause was tried by jury and a verdict of guilty returned as to reckless homicide. The jury was silent as to a verdict on the charge of invountary manslaughter. Petitioner successfully appealed his conviction to the Indiana Supreme Court and the cause was reversed and a new trial ordered. A copy of the Opinion of the Indiana Supreme Court is attached hereto in the Appendix at page 4. At the second trial Petitioner was not only recharged with the crime of reckless homicide, in Count 1 but also again charged with the crime of involuntary manslaughter in Count 2. (Tr. pp. 14, 15.)

Petitioner filed a special plea of former jeopardy under the Indiana and the United States Constitutions addressed to Count 2, the pertinent parts of which are as follows:

> "Comes now the defendant, Ronald Richard Cichos, by his counsel, Warren Buchanan and John B. McFaddin, and for an additional special plea herein, alleges and says:
>
> "1. That on November 6, 1958, a second amended affidavit in this cause was filed in the Parke Circuit Court; that in said second amended affidavit this defendant was charged in two counts with the statutory offenses of reckless homicide, by count 1 thereof, and involuntary manslaughter, by count 2 of said second amended affidavit; that a bench warrant was issued by the Parke

Circuit Court for the arrest of said defendant on said charges; that this defendant was thereupon arrested and held to answer to said charges; that a copy of the second amended affidavit herein charging this defendant with such offenses, certified as true and correct by the Clerk of this Court, is attached hereto, made a part hereof and marked Exhibit 'A.'

"2. That by its terms, said second amended affidavit charged that this defendant on September 28, 1958, in Parke County, Indiana, committed the offenses of reckless homicide and involuntary manslaughter by then and there, unlawfully and feloniously, operating a motor vehicle upon and along a high way at and in the County of Parke, in the State of Indiana, while under the influence of intoxicating liquor, and that the said defendant then and there drove and operated his said automobile into and against an automobile then and there driven and operated on said highway and in and on which one Frank Glen Barber and Shella Mae Barber were then and there riding and that the said Frank Barber and Shella Mae Barber were injured and wounded as a result of such collision and that they died as a result thereof on September 28, 1958.

"3. That the defendant was arraigned in the Parke Circuit Court, before the judge thereof, on November 24, 1958, and entered a plea of not guilty to the charges of reckless homicide and involuntary manslaughter as contained in said second amended affidavit.

"4. That during the months of November and December, 1959, this cause was tried in the Parke Circuit Court, and that the jury, at the trial of said cause, returned a verdict finding the defendant guilty of reckless homicide, as charged in said second amended affidavit; that the jury, at the trial of said cause, did not return a verdict finding the defendant guilty of involuntary manslaughter, as charged in count 2 of the second amended affidavit herein; that the Court

rendered judgment of conviction and sentence on the verdict in this cause on February 16, 1960; that the defendant filed a motion for a new trial in said cause, and that said motion was over-ruled by the Court; that on August 12, 1960, and within the time granted by the Supreme Court of Indiana for such purpose, the defendant filed a transcript of the record and assignment of errors on an appeal of said conviction to said Supreme Court of Indiana; that on July 2, 1962, the Supreme Court of Indiana reversed the judgment of conviction of the defendant and this cause was remanded to this Court with instructions to sustain defendant's motion for new trial; that this cause is now assigned for re-trial in this Court for June 13, 1963; that a copy of the verdict returned by the jury herein finding the defendant guilty only of the offense of reckless homicide, certified as true and correct by the Clerk of this Court, is attached hereto, made a part hereof and marked Exhibit 'B.'

"5. That the defendant is now charged with the Statutory offenses of reckless homicide and involuntary manslaughter, as charged in counts 1 and 2, respectively, of the second amended affidavit herein; that the jury in the original trial of this cause, by failing to return a verdict as to the second count of the second amended affidavit herein, by implication, acquitted the said defendant of the charge of involuntary manslaughter.

"6. That the prior prosecution and acquittal of the defendant on the charge of involuntary manslaughter would now bar any further prosecution of said defendant based upon the same crime.

7. That the facts necessary to convict the defendant on count 2 of the second amended affidavit now pending in this Court were adjudicated by the failure of the jury at the prior trial of the same to return a verdict on said count, thus acquitting said defendant of said crime; that the defendant cannot be placed in jeopardy,

the second time, for the same offense; that prosecution to a final judgment of the offense in the prior trial of the same is a bar to his prosecution as to the second count of the second amended affidavit now pending in this Court.

"WHEREFORE, the Defendant prays that the charge of involuntary manslaughter as set forth in the second count of the second amended affidavit now pending against him be dismissed.

RONALD RICHARD CICHOS, Defendant
BY: Warren Buchanan
John B. McFaddin (wa)
His Attorneys

STATE OF MEXICO)
)SS:
COUNTY OF QUAY)

RONALD RICHARD CICHOS, after being first duly sworn upon his oath, says:

That he is the defendant in the above entitled cause of action and that the facts stated in the foregoing VERIFIED SPECIAL PLEA OF FORMER JEOPARDY are true in substance and in fact.

Ronald Richard Cichos
(Ronald Richard Cichos)

SUBSCRIBED and SWORN to before me this 31 day of MAY, 1963.

Opal Skelton
NOTARY PUBLIC

(SEAL)

My Commission expires:
Dec. 29, 1964 (Tr. pp. 11-13)

The trial Court sustained a demurrer to this special plea.

(R. p. 99) Petitioner moved for directed verdicts upon this count because of former jeopardy both at the conclusion of the State's evidence and at the conclusion of all of the evidence. The pertinent parts here are as follows:

> "Comes now the defendant by his attorneys, Warren Buchanan and John B. McFaddin, at the conclusion of the prosecution's case in chief and after the prosecution has rested and before the introduction of evidence in support of the defendant's defense and moves the Court to forthwith direct a verdict herein for the defendant and to discharge the defendant from custody, and tenders and offers an instruction for such purpose, for the following reasons and for each of said reasons, separately and severally considered, to-wit:
>
> • • • • •
>
> "5. The defendant at the original trial of this case was acquitted and, by implication, found not guilty of involuntary manslaughter, as charged in Count II of the 2nd Amended Affidavit. The defendant cannot be tried more than one time for the same offense. Therefore, in the present trial, the jury should be directed to return a verdict finding the defendant not guilty of the offense of Involuntary Manslaughter charged in Count II of the 2nd Amended Affidavit."
>
> (Tr. pp. 21-22)

• • • • •

and

> "Comes now the defendant by his attorneys, Warren Buchanan and John B. McFaddin, at the conclusion of all the evidence in the case, and before argument and before the Court has instructed the jury and moves the Court to forthwith direct a verdict herein for the defendant and to discharge the defendant from custody, and tenders and offers an instruction for such purpose,

for the following reasons and for each of said reasons, separately and severally considered, to-wit:

• • • • •

"The defendant at the original trial of this cause was acquitted and, by implication, found not guilty of Involuntary Manslaughter, as charged in Count II of the 2nd Amended Affidavit. The defendant cannot be tried more than one time for the same offense. Therefore, in the present trial, the jury should be directed to return a verdict finding the defendant not guilty of the offense of Involuntary Manslaughter charged in County II of the 2nd Amended Affidavit."

(Tr. pp. 25-26)

Both were overruled. Verdict was returned finding defendant guilty of Reckless Homicide. Motion in Arrest of Judgment, again presenting the question of Multiple Jeopardy was filed by Petitioner. (Tr. pp. 30-32) Again such was overruled. Again, Petitioner was found guilty of reckless homicide. His Motion for New Trial promptly filed was overruled. The part of such Motion addressed to the jeopardy question is as follows:

"2. Irregularities in the proceedings of the Court, or jury, and orders the Court and abuse of discretion by which the defendant was prevented from having a fair trial in this, to-wit:

"The Court erred in sustaining the demurrer of the State of Indiana to the defendant's verified special plea of former jeopardy addressed to the charge against the defendant of the offense of involuntary manslaughter as set forth in the second count of the second amended affidavit upon which the defendant was tried in this cause."

(Tr. pp. 32-33)

• • • • •

"6. Error of law occurring at the trial in this, to-wit:

The Court erred in overruling defendant's motion, at the conclusion of evidence presented by the State of Indiana, and after the State of Indiana had rested its case, that the jury be forthwith directed to return a verdict herein finding the said defendant not guilty of the offenses charged in the 2nd amended affidavit in this cause, and in refusing to give the jury an instruction then and there tendered to the Court by the defendant for such purpose, which said tendered instruction was as follows:

INSTRUCTION DIRECTING JURY TO RETURN VERDICT FOR DEFENDANT TENDERED WITH DEFENDANT'S WRITTEN MOTION FOR SUCH PURPOSE.

Instruction No. 4

Members of the jury you are directed to immediately and forthwith return a verdict finding the defendant not guilty of the offenses charged in the 2nd Amended Affidavit in this cause.

JUDGE, THE PARKE CIRCUIT COURT

"7. Error of law occurring at the trial in this, to-wit: The Court erred in overruling defendant's motion, after the State of Indiana and the defendant had rested, and after the introduction of all of the evidence in this cause had been completed, and before argument of counsel, that the jury be forthwith directed to return a verdict herein finding the said defendant not guilty of the offenses charged in the 2nd amended affidavit in this cause, and in refusing to give the jury an instruction then and there tendered to the Court by the defendant for such purpose, which said instruction was as follows:

INSTRUCTION DIRECTING JURY TO RETURN VERDICT FOR DEFENDANT TENDERED WITH DEFENDANT'S WRITTEN MOTION FOR SUCH PURPOSE.

Instruction No. B

Members of the jury you are directed to immediately and forthwith return a verdict finding the defendant not guilty of the offense charged in County II of the 2nd Amended Affidavit in this cause.

JUDGE, THE PARKE CIRCUIT COURT

(Tr. p. 38)

On appeal to the Supreme Court of Indiana Petitioner assigned as error the overruling of his motion for new trial and the Court (Tr. p. 48) deciding the case on its merits, held that former jeopardy although existing in this case had been waived by Petitioner's first appeal and that a second trial even as to the involuntary manslaughter was permissible without violation of the double jeopardy provisions of the Indiana Constitution because of such waiver. The Supreme Court of Indiana further held that no Federal question under the Fourteenth Amendment of the Constitution of the United States was involved and no protection under that Amendment afforded to state action regarding *double* jeopardy. Upon re-hearing, the Indiana Supreme Court affirmed its earlier holding. Its language concerning the Federal question under the Fourteenth Amendment reads as follows:

> "Three: Appellant finally contends that retrial under both counts of the indictment constituted double jeopardy as prohibited by the Fifth Amendment and the due process clause of the Fourteenth Amendment to the U. S. Constitution.

"Appellant asserts that, despite the established Indiana law on this issue, a change in Indiana Law is compelled by *Green* v. *United States* (1957), 355 U. S. 184, 2 L. Ed. 2d 199. However, among other facts which must be considered in relation to this assertion is the fact that the Green case was a federal case and therefore the rule enunciated arose under the U. S. Supreme Court's supervisory power over federal courts. The Green case involved a retrial on a murder charge, and resulted in a verdict of guilty of first degree murder, after a prior trial which had resulted in a second degree murder conviction had been reversed on appeal. Applying the Fifth Amendment double jeopardy provision, the Supreme Court held that a conviction of a lesser included offense amounted to an acquittal of the greater offense. Consequently, they reasoned that, on retrial, the accused could be tried for no greater charge than that for which he was originally convicted.

"Aside from the obvious fact that the Green case, *supra,* involved the application of federal law and federal standards, there is the distinction concerning the character of the charges twice in issue. The offenses here involved are statutorily treated more as one offense with different penalties rather than viewing reckless homicide as an included offense in involutary manslaughter.

"Since the elements of both counts are almost identical it is recognized that a verdict of guilty of reckless homicide does not logically exclude the possibility of such a verdict on the charge of involuntary manslaughter for constitutional reasons as would be the case when a conviction is had on a lesser included offense. See Burns' Ind. Stat. Ann. Sec. 47-2002 (1956 Repl.).

"When dealing with such interconnected offenses it is almost futile to attempt to sort out error and reverse a case only as to those errors which affected the defendant. Recognizing this futility, this state has accepted the position adopted by a substantial number

of states, that when a defendant initiates an appeal asking for a new trial and the appeal disclosed error, the original trial is treated as a total nullity, leaving the parties as they were prior to the proceeding tainted with error. Burns' Ind. Stat. Anno. Sec. 9-1902 (1956 Repl.). Compare: *Green* v. *United States, supra.* 355 U.S. 184, 216 n. 4; 2 L. Ed. 2d 199, 220 n. 4 (dissenting opinion).

"The protection against double jeopardy has never specifically been incorporated within the scope of the due process clause of the 14th Amendment, *supra,* by the Supreme Court. Arguable, double jeopardy provision is not necessarily a hallmark of either system, and it is reasonable to assume that some limitation on the total incorporation of the Fifth Amendment within the due process clause of the 14th Amendment may still exist.

"In view of the diverse reasoning by many of the states concerning double jeopardy in situations similar to the instant case, it does not appear that the federal standard of double jeopardy in *Green v. United States, supra.* can be deemed so fundamental a concept of ordered liberty as to compel a total revision of state interpretations of the doctrine, which interpretations of their own constitutions are primarily the prerogative of the states."

SUMMARY OF ARGUMENT

The basic and fundamental nature of the right against double jeopardy has always *at some point* been embraced within constitutional due process. Thus, necessarily a state has always been limited in its refusal to recognize or apply the protection from double jeopardy.

The creation of multiple statutory offenses for the same qualitative act is, in itself, an encroachment upon this guarantee. When, as here, a defendant is tried in this manner, is legally acquitted of one of such charges and

successfully appeals his conviction of the other, but is then subjected to a *second* trial on both of such counts, the point of constitutional due process has been reached.

A criminal defendant is not constitutionally required to waive the basic guarantee against former jeopardy by his selection to appeal an improper conviction. Furthermore, if such an appeal is successful, a defendant should not be compelled to again stand trial on a charge upon which he had been acquitted. If *Palko* v. *Connecticut,* 302 U. S. 319 (1937) sanctions such a result, it is certainly repugnant to basic tenets of ordered liberty and should be overruled. To subject a criminal defendant to the dilemma of choosing between accepting an improper conviction and a retrial on issues where has has once been tried but not convicted, is inherently unfair and violative of due process.

The fact that Petitioner is acquitted a second time on a count in no way mitigates against the effect of the recharge and retrial of such count. Certainly the unfairness of prosecution leverage in such a retrial to gain a conviction on a different count is necessarily present. Any contention of "mootness" is therefore not relevant to the practicalities of such a retrial.

Historically and conceptually the guarantee against dual jeopardy is significant in the Anglo-American system of jurisprudence. It is of such significance that logic alone calls for its inclusion within the framework of due process. The guarantee against double jeopardy presents the totality of many protections. To deny its absorption within due process would necessarily be to drain the vitality from many other constitutional guarantees such as self incrimination, unreasonable search and seizure and even the right to counsel. Those protections are necessarily relegated to a less important position if successive trials, even highly protective ones, are permissible until conviction results.

ARGUMENT

The instant case concerns itself with a facet of the absorption process of various constitutional rights found in the first ten Amendments to The United States Constitution within the ambit of the Fourteenth Amendment. The particular concern is with the "double jeopardy" protection contained in the Fifth Amendment.

Petitioner in this case was originally charged with violation of Burns' Ind. Stat. Ann. Sec. 47-2001(a) defining the offense of reckless homicide as follows:

> "Reckless Homicide. Any person who drives a vehicle with reckless disregard for the safety of others and thereby causes the death of another persons shall be guilty of the offense of reckless homicide. Any person convicted of reckless homicide shall be punished by a fine of not less than one hundred dollars ($100) or more than one thousand dollars ($1,000), or by imprisonment in the state farm for a determinate period of not less than sixty (60) days and not more than six (6) months, or by both such fine and such imprisonment, or by a fine of not more than one thousand dollars ($1,000) and imprisonment in the state prison for an indeterminate period of not less than one (1) year or more than five (5) years"

and has been also charged with violation of Burns' Ind. Stat. Ann. Sec. 10-3405 which defines the crime of involuntary manslaughter as follows:

> "Whoever voluntarily kills any human being without malice, expressed or implied, in a sudden heat, or involuntarily in the commission of some unlawful act is guilty of manslaughter, and on conviction shall be imprisoned not less than two (2) years nor more than twenty-one (21) years."

Two amendments were made and Petitioner subsequently stood trial on both of the above charges. It may be noted that an Indiana Statute, Burns' Ind. Stat. Ann., Sec. 47-2002(1), permits joinder of the above charges but recognizes the jeopardy and collateral estoppel features of the offenses by providing for sentencing only as to one such offense and providing further that an adjudication of one bars prosecution of the other.

Rogers v. *State,* 227 Ind. 709, 88 N. E. 2d 755 (1949); *State* v. *Beckman,* 219 Ind. 176, 37 N. E. 2d 531 (1941).

That statute is as follows:

"(1) Each of the three (3) offenses defined in this section is a distinct offense. No one of them includes another, or is included in another one of them. Section 52, subsection (a) Sec. 47-27001(a), in creating the offense of reckless homicide, does not modify, amend or repeal any existing law, but is supplementary thereto and to the other sections of this act. All three (3) of the offenses, or any two (2) of them, may be joined in separate counts in the same indictment or affidavit. One (1) or more of them may be joined in separate counts with other counts alleging offenses not defined in this section, such as involuntary manslaughter, if the same act, transaction or occurrence was the basis for each of the offenses alleged. With respect to the offenses of reckless homicide and involuntary manslaughter, a final judgment of conviction of one (1) of them shall be a bar to a prosecution for the other; or if they are joined in separate counts of the same indictment or affidavit, and if there is a conviction for both offenses, a penalty shall be imposed for one (1) offense only."

The Respondent, State of Indiana, has acknowledged the fact that the two offenses are qualitatively identical. (Respondent's brief on Petition for Certiorari, pp. 11, 12.)

The first trial resulted in a conviction as to the charge of reckless homicide and jury silence as to the charge of involuntary manslaughter. Petitioner successfully appealed his conviction of reckless homicide to the Indiana Supreme Court and a new trial was subsequently granted. The opinion of the Supreme Court is reported at 243 Ind. 187 and at 184 N. E. 2d 1 and is included in the appendix to this brief. The new trial, however, was held over Petitioner's vigorous objections on both charges, i.e., reckless homicide and involuntary manslaughter. Thus Petitioner was again tried for both reckless homicide and involuntary manslaughter although the jury had acquitted him of the latter by its failure to return any finding on the latter charge.

Anderson v. *State*, — Ind. —, 214 N. E. 2d 169 (1966).

The Indiana Supreme Court, on appeal held that Petitioner could be twice charged with involuntary manslaughter as well as reckless homicide. That Court further held that no federally protected right was involved for the reason that "double jeopardy . . . is not necessarily a hallmark of either system . . ." and such is not "so fundamental a concept of ordered liberty as to compel a total revision of state interpretations of the doctrine . . . ."

The rationale was based on a theory that a criminal defendant waives the right not to be twice tried for the same offense by perfecting an appeal. This, according to the Indiana Supreme Court, permits a retrial not only on the counts for which a defendant was convicted, but, in addition, all counts involved in the original trial *even if the defendant has been legally acquitted of such.*

Application of any of the Bill of Right's protections to the various States through the Fourteenth Amendment has necessarily involved determination of certain preliminary

factors. Thus initial determination as to the legal and factual existence of self-incriminatory procedures was necessary before the constitutional question of "absorption" was reached.

Malloy v. *Hogan*, 378 U. S. 1 (1964).

Similarly, protection of the right to counsel as established in *Gideon* v. *Wainright*, 372 U. S. 335 (1963) and *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), was afforded only after denial of that right at a particular state of the incriminatory proceedings was factually established. The unreasonableness of a search and seizure and when and by whom made are thus preliminary factors which may or may not trigger the absorption of appropriate protection for an accused.

Mapp v. *Ohio*, 367 U. S. 643 (1962).

The related doctrine of double jeopardy is equally concerned with certain basic preliminary determinations. Once these are found to exist, that doctrine possesses all of the historical and rational basis for absorption as found in any of the above doctrines with which it has great affinity. In this case, however, there is no dispute as to the existence of former jeopardy; rather the dispute goes only to the qualitative measure of one's protection against it!

In previous considerations of the applicability of the Fourteenth Amendment to double jeopardy cases much of the concern has apparently centered on determinations as to whether double jeopardy did in fact exist. Thus in *Abbate* v. *United States*, 359 U. S. 187 (1959) this Court held that trial in federal courts to vindicate federal law was not precluded by a prior state proceeding under state law for the same criminal act. The corollary of this rule

occurred in *Bartkus* v. *Illinois*, 359 U. S. 121 (1959) holding a subsequent state proceeding not to be barred by a prior federal action for the same criminal act. The dual sovereignty system in the United States is such that neither sovereign may, by its action, preclude enforcement of the criminal laws of the other. Enforcement of criminal sanctions are, according to this concept, a part of the essence of sovereignty and protection of the interest of each sovereign as enumerated in its statutes is equally the essence of federalism. Thus prosecution by separate sovereigns to enforce separate statutes is *actually not double jeopardy.* (At least when viewed from the point of view of the prosecution.) Arguably then neither *Bartkus or Abbate* were as concerned with absorption of "double jeopardy" into the Fourteenth Amendment as they were with the preliminary issue as to whether or not dual jeopardy in the Constitutional sense in fact existed. Of importance here is the fact that relief to Petitioner does not depend upon the overruling of either *Bartkus* or *Abbate.* In this case there is no doubt but that jeopardy twice attached by the *same sovereign* for the *same identical offense* (involuntary manslaughter). In fact when viewing the qualitative aspects of the multiple offenses, it is clear that actually Petitioner was subjected to four separate charges at two trials for essentially the same offense.[1]

Far removed from the dual sovereignty policy considerations decided in *Abbate* and *Bartkus,* this cause concerns itself with aspects of admitted jeopardy.

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[1] It is conceded that reckless homicide and involuntary manslaughter possess identical elements in regard to motor vehicle deaths. Petitioner stood trial on *four* counts at *two* trials for identical qualitative offenses.

I. THE PROTECTION AGAINST DOUBLE JEOPARDY IS OF SUCH FUNDAMENTAL NATURE AS TO CONSTITUTE A FOURTEENTH AMENDMENT PROTECTION AT LEAST UNDER THE CIRCUMSTANCES OF THE CASE AT BAR.

The importance of the protection against double jeopardy is well illustrated by the historical prominence which it has occupied in our Anglo-American jurisprudence. This has been ably articulated in the dissent of Justice Black in *Bartkus* v. *Illinois*, 359 U. S. 121, 150 (1959).

See also:

70 *Dickinson Law Review* 377 (1966);

Sigler, *History of Double Jeopardy, American Journal of Legal History*, vol. 7, p. 283 (1963).

The motivations upon which this majestic history is based are indeed many. The principles of both *res judicata* and of collateral estoppel give practical logic to the defense of double jeopardy.

Restatement, Judgments Sec. 62 Comment f.

In addition to the finality of judgments and the public convenience policy considerations, several more fundamental concerns make this right of utmost importance. The tremendous resources of the prosecution, the social stigma attached to the defense of a criminal charge, the threat of one's freedom and the realization that should a state be permitted an issue before enough juries, conviction is almost certain are compelling reasons for regarding double jeopardy among the class of man's most fundamental rights.

Green v. *United States*, 355 U. S. 184 (1957);

United States v. *Wilkins*, 348 F. 2d 844, 849 (1966); 70 Dickinson Law Review 382 (1966) *supra*.

As discussed later herein some aspects of double jeopardy have probably always been interdicted by the Fourteenth Amendment. Furthermore, both a review of double jeopardy and of the basic policy questions related thereto act as a buttress to the postulate that double jeopardy has always been within Fifth Amendment due process. This inclusion of double jeopardy protection within Fifth Amendment due process has been reflected in many decisions which have established basic federal protections against the jeopardy features inherent in retrials for vertical offenses such as in *Green* and in the relitigation of similar or horizontal offenses such as exist here. Thus, a second trial for an offense which requires the *same* evidence has long been held violative of federal due process.

Blockburger v. *U. S.*, 284 U. S. 299 (1932);

In re Neilson, 131 U. S. 176 (1889);

U. S. v. *Maybury*, 274 F. 2d 899 (2nd Cir. 1960).

Justice Brennan in *Abbate* at 359 U. S. 199 (1959), noted the associated evil inherent in permitting the Government to multiply the number of offenses by statute which resulted from the same act.

The articulation of the Fifth Amendment due process as inclusive of the basic rights of man, including the protection against double jeopardy, has resulted in cogent argument for the proposition that "due process" should not import one thing with reference to the National Government and something entirely different with reference to the States.

See:

Justice Harlan's dissent in *Hurtado* v. *People of California,* 110 U. S. 516, 538 (1884).

Certainly incorporation of the entire Bill of Rights into the Fourteenth Amendment has been urged as a practical realization of this equality of due process application.

II. LIKEWISE THE DOCTRINE OF SELECTIVE INCORPORATION REQUIRES INCLUSION OF THE DOUBLE JEOPARDY PROTECTION OF THE FIFTH AMENDMENT INTO THE FOURTEENTH AMENDMENT.

In the instant action, however, relief to Petitioner is required whether total absorption of the Bill of Rights is accepted or whether continued recognition is given to selective incorporation for the reason that selective incorporation would also bring within the ambit of the Fourteenth Amendment such fundamental right as the protection against multiple jeopardy.

See:

Henkin, *Selective Incorporation,* 73 Yale L. J. 74 (1966).

Although *Palko* denied absorption of a specific facet of double jeopardy within the framework of the Fourteenth Amendment, it, nevertheless, seems clear that federal due process has always accepted *some* aspect of double jeopardy within its constitutional ambit, as applied to the States.

U. S. ex rel. Hetenyi v. *Wilkins,* 348 F. 2d 844 (2d Cir. 1965);

Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. of Chi. L. Rev. 591, 594 (1961);

Double Jeopardy, The Reprosecution Problem, 77 Harvard L. Rev. 1272 (1964).

In fact, even the late Justice Frankfurter recognized this fact when he stated in *Brock* v. *North Carolina*, 344 US 424 (1953) at page 429 as follows:

> "A state falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted or prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time."

See:

Dissent of Justice Black in which Justice Douglas joined in *Adamson* v. *California*, 332 U. S. 46, at page 71 (1947).

Petitioner submits that (1) if subjecting a criminal defendant to successive trials for similar or "same evidence" offenses is violative of Fifth Amendment due process, *a fortiori* successful trials for an identical offense would violate federal due process especially when it is coupled at each trial with a second charge alleging substantially the *same thing*, and (2) double jeopardy as applied to state due process under the Fourteenth Amendment can be made effective only by adopting the federal standards and criteria.[2]

[2] Even the doctrine of selective incorporation of those fundamental rights that have already been held to be within the Fourteenth Amendment have carried with it application of federal standards existing under the Bill of Rights. This is illustrated by *Kerr* v. *California*, 374 U. S. 23 (1963), and *Gideon* v. *Wainright*, 372 U. S. 335 (1963).

Miranda v. *Arizona*, — U. S. —, 16 L. Ed. 2d 694 (1966).

To summarize, one would be hard pressed to visualize a case where multiple exposure to criminal penalties for one transaction could be any greater than the one at bar. Petitioner is admittedly subjected to dual counts for offenses which factually and legally are identical. This evil of identical statutory offenses with separate but unequal penalties would alone be of dubious fairness.[3] Coupled with this however, is the fact that after successfully receiving an acquittal of one such offense and a reversal on appeal as to the other, Petitioner is, for the *second* time, subjected to both charges, including that for which he had legally been acquitted. Double jeopardy protection here has become a sterile doctrine.

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[3] At the time of Petitioner's original appeal a survey of the various States and their attempt to deal with the motor vehicle death situation was made and *only* Indiana had created substantively identical offenses which could be joined as multiple counts. The review of the states indicated as follows:

The particular statutory approach to secure convictions in such cases differs among the various jurisdictions. Some states have, by statute, made the new offense a lesser includable one under the general manslaughter act.

Rev. Laws of Hawaii, 1955, Sec. 291-10, Sec. 291-11;

Mich. Stat. Ann. 28.556, 28.557;

Ark. Stat. Ann. 1957 Repl. 75-1001.

This result has been achieved by judicial construction of the statutes existing in several other jurisdictions.

Smith Hurd, Ill. Stat. Ann., Sec. 363, 364(a);

Gen. Stat. Kan., Sec. 8-529, Sec. 21-420;

Ky. Rev. Stat., 435.020, 435.025;

Rev. Stat. Me., 1954, Sec. 151, 151-B;

N. J. Stat. Ann., Sec. 2A, 113-5, 113-9.

In many of these states the degree of culpability necessary for a con-

III. AN ARGUMENT THAT "WAIVER" OR "MOOTNESS" EXISTS IS UNTENABLE.

It is true that *Palko* v. *Conn.*, 302 U. S. 319 (1937) *supra*, denied absorption of the doctrine within the concept of

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Footnote continued from previous page:

viction under the newly created statute is somewhat less than the "recklessness and wantonness" necessary under the manslaughter statute.

The situation seems to be the reverse in South Carolina, where mere negligence is sufficient to convict under the manslaughter statute but recklessness is required under the reckless homicide statute.

Code of Law of S. C., Sec. 16-55, Sec. 46, 341.

Consequently, a defendant cannot be guilty of both.

***State* v. *Cravers* (1960), 236 S. C. 305, 114 S. E. 2d 401.**

Where the new offense is not of lesser degree than manslaughter and thus not includable under the general manslaughter statute, the judicial construction has many times been then an implied repeal of the general manslaughter act, insofar as it pertains to highway deaths was accomplished.

***State* v. *Davidson*, — Idaho —, 309 P2d 211;**
construing Idaho Code Sec. 39-1001;

McKinney's *Consolidated Laws of New York*, 39 Sec. 1053(a);

Opinions of the Attorney General (1936), p. 141.

It might be further noted that many states still use the manslaughter act as the basis of highway death prosecutions and have refused to enact statutes imposing a criminal penalty for some degree of culpability less than recklessness because of some difficulty in obtaining convictions under the general act.

Code of Ala. (1958), Tit. 14, Sec. 320;
Del. Code Ann., Tit. 11, Sec. 575;
Fla. Stat. Ann., Tit. 44, Sec. 782.07;
Ga. Code Ann., Sec. 26-1009;
Iowa Code Ann., Sec. 690.10;
N. Mex. Stat. Ann. (1953), 40-24-7;
Nev. Rev. Stat., Sec. 200.070;
Rev. Code Mont., Sec. 94-2507;
Mass. Gen. Law Ann., Sec. 265.13;
Vernon's Mo. Stat. Ann., Sec. 559.070;

due process when an appeal resulted in a new trial. Although Petitioner earnestly contends *Palko* to be incompatible with *Mapp* v. *Ohio*, 376 U. S. 643 (1961), *Gideon* v. *Wainright*, 372 U. S. 335 (1963), *Malloy* v. *Hogan*, 378 U. S. 1 (1964) and *Pointer* v. *Texas*, 380 U. S. 400 (1965) it may be worthy to note that here it is not only a waiver by appeal such as *Palko* but also the evil of multiple offenses for the same act to which this Petitioner was subjected. Thus, to deny relief here is not only to run afoul of *Mapp*, *Gideon*, *Malloy* and *Pointer* but to extend the waiver doctrine beyond the framework of *Palko* itself.

In this case there is no question as to Petitioner being twice placed in jeopardy. In fact, Respondent places its entire argument on the waiver theory which was rejected in *Green* and on a "mootness" argument which is unsupportable both conceptually and factually. Both of these assertions were before the Circuit Court of Appeals in *United States ex rel. Hentenyi* v. *Wilkins*, 348 F. 2d 844 (2nd Cir. 1966) *supra*. There the Defendant in a State Court had been tried for first degree murder and convicted of second degree murder, an includable offense. His successful appeal resulted in his being retried (and convicted) for first degree murder (directly contrary to the holding in *Green*). A successful appeal of this conviction resulted in a third trial for first degree murder and this time a con-

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Footnote continued from previous page:

Miss. Code Ann., Sec. 2232;
N. Dak. Rev. Code, Sec. 17-716;
Purdon's Pa. Stat. Ann., Sec. 18-4702;
S. Dak. Code, 13.2016;
Tenn. Code, Sec. 391a406.

In Oregon, the statute itself specifically provides that the manslaughter act is not applicable to highway cases.

Ore. Rev. Stat., Sec. 163.040 and 163.091.

viction of second degree murder. That Court discusses the various rationale regarding absorption of the jeopardy concept and equally significant the concepts of waiver and mootness. Its persuasive language at 348 F. 2d 859 is as follows:

> "It is difficult to understand how the fundamental unfairness inherent in allowing prosecutor to "do better a second time" (Mr. Justice Frankfurter, concurring in Brock v. North Carolina, supra, 344 U. S. at 429, 73 S. Ct. at 351) is mitigated by conditioning this second chance on a successful appeal by the accused. To suggest that the accused, by appealing the conviction, somehow "agreed" to subject himself to the reprosecution on the greater charge if the conviction for the lesser charge is reversed, thereby rendering such a reprosecution fair, cf. People v. Palmer, supra, is to ignore the elementary psychological realities of the situation, see, Kepner v. United States, supra, 195 U.S. at 135, 24 S. Ct. 797 (Holmes, J., dissenting), Green v. United States, supra, 355 U.S. at 192, 78 S. Ct. 221 and to presume, quite inconsistently with the evolution of our communal values, that a barter theory of fairness operates with no less force in the halls of justice than it does in the market place, see generally, Fay v. Noia, 372 U. S. 391, 83 S. Ct. 322, 9 L. Ed. 2d 837 (1963)."

That Court concerned itself also with the contention that no prejudice (or a "moot" question as it is called here) exists because the Defendant ended his series of trials without conviction on the first degree murder charge. (Similarly Petitioner at this juncture has, as yet, not been convicted of involuntary manslaughter.) Its rejection of that contention is as follows at 348 F. 2d 844, 864, 865:

> "The question is not whether the accused was actually prejudiced, whether there is *reasonable possibility* that he was prejudiced . . . The ends of justice would not be

served by requiring a factual determination that the accused was actually prejudiced in his third trial by being prosecuted for and charged with first degree murder, nor would the ends of justice be served by insisting upon a quantitative measurement of that prejudice. The energies and resources consumed by such injury would be staggering and the attainable level of certainty most unsatisfactory. There could never be any certainty as to whether the jury was actually influenced by the unconstitutionally broad scope of the reprosecution or whether the accused's defense strategy was impaired by this scope of the charge, even if there were a most sensitive examination of the entire trial record and a more suspect and controversial inquest of the jurors still alive and available. . . . The mere fact that the accused is in custody for second degree murder, the only reason offered by the District Court to justify its conclusion that "the procedure complained of has not resulted in any hardship to relator," is not sufficient to exclude this possibility, or to make it less than reasonable . . . .

"Moreover, in this instance, and on the elementary facts established—that the indictment of the third trial charged first degree murder, that the prosecution focused on obtaining a conviction on that charge, and that the jury was given the alternative of finding him guilty of that charge—we hold that there would be no rational basis for concluding that it is not reasonably possible that the accused was prejudiced by the unconstitutionally broad scope of the prosecution."

Similarly Respondent's argument of "mootness" or "no prejudice" is untenable here. Certainly the protection against double jeopardy is not confined to the verdict or judgment. Rather it is the "jeopardy" of such verdict or judgment by the subjugation of one to successive trials that is at the heart of the protection. Furthermore, the "harm" inherent in permitting either successive counts for

the same offense or successive trials for a previously adjudicated offense, or *both* affords prosecution leverage and compromising jury possibilities of a most prejudicial nature. In any event this Court has quite recently repudiated the relevancy of such a lack of prejudice argument *even had it existed.* Thus in *Brookhart* v. *Janis,* — U. S. —, 86 S. Ct. 1245 (1966) this Court said,

> "In this Court respondent admits that:
>
> 'If there was here a denial of cross-examination without waiver, it would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' This concession is properly made."

No basis, logical or historical, could justify isolation of doube jeopardy guarantees from the confines of due process which include such allied protections as self-incrimination, search and seizure, right to counsel, and confrontation of witnesses. It is equally arguable that double jeopardy, especially when coupled with the creation of multiple offenses of identical nature, is basically unfair (independent of the specific jeopardy provision of Fifth Amendment) under a system which guarantees due process of law. The fact that the guarantee against double jeopardy is inherent in our system of due process as a part of fundamental fairness and justice, even in spite of and apart from *Palko* has received very recent judicial recognition.

Norkett v. *Stallinger,* 251 F. Supp. 662 (E.D.N.C. 1966);

People v. *Ressler,* 17 N. Y. 2d 174, 216 N. E. 2d 582 (1966).

Green now firmly establishes the principle that a criminal defendant may not constitutionally be tried on a greater

charge after having been once in jeopardy on that charge in a trial which resulted in a conviction for a lesser charge. This, too, is of the essence of due process. The fact that in this case the retrial was on two separate counts alleging the same substantive offense rather than in two vertical counts alleging includable offenses certainly does not tend to mitigate the significance of *Green*. Actualy the result in *Green* again becomes *a fortiori* here.

IV. CONCLUSION

A review of the doctrine of double jeopardy in the context of our constitutional law leads logically and inescapably to the necessity of at least partial absorption of its commands within the Fourteenth Amendment guarantees. The importance of the doctrine and its significance as a right entitled to federal protection, actually calls for adoption of universal, federal standards of double jeopardy and the protection of such from state encroachment.

See:

Sigler, *Federal Double Jeopardy Policy*, 19 Vand. L. R. 375 (1966);

Fisher, *Double Jeopardy and Federalism*, 50 Minn. L. R. 607 (1966).

The ideology of *Palko* is repugnant to this concept, and, as in other civil liberty cases, it must yield if we are to give meaning to the individual protections so important in our democracy.

Double jeopardy actually presents, in a sense, the totality of many protections and, as such, is of equal if not greater stature. The right to be free from certain repulsive aspects of a criminal trial such as, self incrimination, unreasonable search and seizure, inability to cross-examine

witnesses, and even the right to counsel; become largely academic if a defendant may be subjected to successive retrials regardless of how protective each particular trial may be. Inclusion of these segments of a criminal trial as a part of due process thus requires similar inclusion for the totality of the trial and the finality of its determination. Double jeopardy is a fundamental concept in ordered liberty. This cause should be reversed.

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IN THE

Supreme Court of The United States

October Term, 1966

No. 45

RONALD R. CICHOS,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

APPENDIX TO BRIEF FOR PETITIONER

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APPENDIX
CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any

person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT XIV—Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

Burns' Indiana Statutes, Annotated, Section 9-1901

"*Definition:* A new trial is a re-examination of the issues in the same court. (Acts 1905, ch. 169, Sec. 280, 58[illegible])"

Burns' Indiana Statutes, Annotated, Section 9-1902

"*Effect of granting—Former verdict not to be referred to in argument.*

"The granting of a new trial places the parties in the same position as if no trial had been had; the former verdict can not be used or referred to, either, in the evidence or in the argument. (Acts 1905, ch. 169, Sec. 281, p. 584)"

Burns' Indiana Statutes, Annotated, Section 47-2001

"Driving—(a) Reckless Homicide. Any person who drives a vehicle with reckless disregard for the safety of others and thereby causes the death of another person shall be guilty of the offense of reckless homicide. Any person convicted of reckless homicide shall be punished by a fine of not less than one hundred dollars ($100) or more than one thousand dollars ($1,000) or by imprisonment in the state farm for a determinate period of not less than sixty (60) days and not more than six (6) months, or by both such fine and such imprisonment, or by a fine of not more than one thousand dollars ($1,000) and imprisonment in the state prison for an indeterminate period of not less than one (1) year or more than five (5) years."

Burns' Indiana Statutes Annotated, Section 10-3405

"*Manslaughter—Penalty.* Whoever voluntarily kills any human being without malice, expressed or implied, in a sudden heat, or involuntarily in the commission of some unlawful act, is guilty of manslaughter, and on conviction shall be imprisoned not less than two (2) years nor more than twenty-one (21) years. (Acts 1941, ch. 148, Sec. 2, p. 447)"

OPINION OF THE SUPREME COURT OF INDIANA IN FIRST CICHOS CASE

No. 29,954

July 2, 1962

Ronald R. Cichos v. State of Indiana

Jackson, Justice—

"Appellant was charged by a second amended affidavit in two (2) counts with (a) violation of Acts 1939, ch. 48, § 52, p. 289, being § 47-2001a, Burns' 1952 Replacement, defining the offense of Reckless Homicide and (b) with violation of Acts 1941, ch. 148, § 2, p. 447, being § 10-3405, Burns' 1956 Replacement, defining the offense of involuntary manslaughter. Trial was had by jury resulting in the verdict finding the defendant guilty of the offense of reckless homicide as charged in count one of the affidavit. Thereafter, on February 16, 1960, the court sentenced the appellant to a term of not less than one (1) year nor more than five (5) years in the Indiana Reformatory and fined him in the sum of $500 plus costs of the trial.

"The record in this cause is so voluminous that it is almost impossible to summarize without unduly extending this opinion. Appellant's original brief consisting of over 450 pages, appellee's brief consisting of 55 pages and the transcript consisting of 1203 pages.

"It will suffice to say that the sufficiency of the charges were challenged by motions to quash the affidavits, appellant also filed among others, motions to produce and suppress evidence, a motion for mistrial, a motion in arrest of judgment, a motion for a Venire De Novo and motion for a new trial containing five causes, 107 specifications and six accompanying affidavits.

"Appellant's assignment of error is the single ground that '(t)he Court erred in overruling the appellant's motion for a new trial.'

"Basically the contensions here to be determined may be narrowed to the alleged error in permitting into evidence the results of certain blood tests allegedly made from samples taken from the appellant and from alleged error in refusing to give certain instructions, hereinafter discussed, tendered by the appellant.

"The factual situation preceding the events culminating in the institution of the prosecution, from which stems this appeal, may be briefly summarized as follows:

"On September 28, 1958, appellant was involved in an automobile collision on U. S. Highway No. 36 about one mile west of Bellmore in Parke County, Indiana. Such collision resulting in the deaths of Mr. and Mrs. Frank Barber and the injury of appellant, he suffering a bilateral fracture of the lower jaw, laceration of the scalp, cerebral concussion rendering him unconscious and a fracture of the right forearm. The collision occurred at approximately 9:30 o'clock a.m.

"Prior to the collision appellant had stopped at Sparks' restaurant in Hollandsburg. While there, he and several other persons, including one William Lowe, drank coffee. After drinking coffee and spending fifteen or twenty minutes in the restaurant while in the process, appellant and Lowe left the restaurant, appellant getting into his car and driving off in the direction of Bellmore.

"Within minutes after leaving the restaurant appellant was involved in the head-on collision resulting in the deaths and injuries heretofore mentioned.

"The instructions tendered by the appellant and refused by the court numbered 16, 21, 24, 25, 26, 42, 49 and 63, in pertinent part, read as folows:

'Instruction No. 16

'Proof that the accident which resulted in the deaths of Frank Glen Barber and Shella Mae Barber arose out of the inadvertence, lack of attention, forgetfulness or thoughtlessness of the defendant, Ronald Richard Cichos, as the driver of the other automobile involved in the accident, or from an error of judgment on the part of the said Ronald Richard Cichos, will not support a charge of reckless homicide or of involuntary manslaughter, and in that event you must find the defendant not guilty of the charges of reckless homicide and involuntary manslaughter.'

'Instruction No. 21

'Members of the jury, I instruct you, that if Ronald Richard Cichos was merely negligent in operating his automobile, then he is not criminally liable, and your verdict must be not guilty.'

'Instruction No. 24

'I instruct you that if Ronald Richard Cichos due to error of judgment caused the collision, then he cannot be guilty of reckless homicide or involuntary manslaughter, and your verdict must be not guilty.'

'Instruction No. 25

'I instruct you if Ronald Richard Cichos due to forgetfulness or thoughtlessness, caused the collision, then he cannot be guilty of reckless homicide or involuntary manslaughter, and your verdict must be not guilty.'

'Instruction No. 26

'Members of the jury, I instruct you, that one must

intend to do, or omit to do the act resulting in injury to another in order to be guilty of reckless homicide or involuntary manslaughter. Now if you believe that the defendant, Ronald Richard Cichos, did not intentionally commit the act and he was only negligent, then your verdict must be not guilty.'

'Instruction No. 42

'Members of the jury, I instruct you that if the defendant was merely inadvertent in his driving then he cannot be found guilty of driving with reckless disregard for the safety of others.'

'Instruction No. 49

'Members of the jury, I instruct you, if the defendant, Ronald Richard Cichos, through inadvertence, or lack of attention or thoughtless negligence, failed to see the other car involved in this accident this would not be sufficient to support a conviction under the statute and you must find him not guilty.'

'Instruction No. 63

'Members of the jury, I instruct you, negligent conduct without more will not support a finding of guilty for reckless homicide and involuntary manslaughter arising out of an automobile accident.'

Appellant contends that he was entitled to have the jury instructed that mere negligence in the operation of a motor vehicle (although civil liability may arise) does not create a criminal liability.

"The substance of these instructions was not covered by any instructions given by the court.

"It has been well established in Indiana that mere negligent operation of a motor vehicle does not render one so

operating it criminally liable,

1. should a death ensue. *Danville* v. *State* (1919), 188 Ind. 373, 123 N. E. 689; *Kimmel* v. *State* (1926), 198 Ind. 444, 154 N. E. 16; *Beeman* v. *State* (1953), 232 Ind. 683, 115 N. E. 2d 919.

"Whether the evidence in this case establishes that the deaths alleged in the indictment occurred from a

mere accident, from negligent conduct or from

2. willful and/or wanton misconduct so as to amount to recklessness, is dependent on the

weight given the various aspects of the case and the evidence by the jury. The very purpose of the jury is to determine, after deliberation and pursuant to the court's instructions, the legal category into which the jury feels the defendant's conduct falls. The appellant's theory of the evidence and the law establishing such theory was never given to the jury in any instructions.

"It is therefore our decision that the failure to give appelant's tendered instructions above numbered and set forth, constituted error as requires a reversal of this cause.

"Other error assigned need not be, and is not here decided.

"Judgment reversed and cause remanded with instructions to sustain appellant's motion for a new trial and for further proceedings not inconsistent with this opinion.

"Arterburn, C. J., Bobbitt and Landis, JJ., concur.

"Achor, J., concurs in result."

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT

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CITATIONS AND AUTHORITY

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STATE OF INDIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provisions are involved in addition to those set forth in the Brief for Petitioner.

Constitution of Indiana, Art. 1, § 14:

> "No person shall be put in jeopardy twice for the same offense. No person, in any criminal prosecution, shall be compelled to testify against himself."

Burns IND. STAT. ANN., § 9-1902:

> "The granting of a new trial places the parties in the same position as if no trial had been had; the former verdict can not be used or referred to, either, in the evidence or in the argument."

QUESTIONS PRESENTED

Petitioner's statement of the question presented does not adequately inform this Court of the issues before it in this case and fails to comply with Rule 23(1)(c). Respondent, therefore, restates the questions presented as follows:

1. Whether the double jeopardy provision of the Fifth Amendment providing "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb" is essential to a scheme of ordered liberty and so rooted in the traditions and conscience of the people or to be ranked as fundamental, and thereby incorporated in the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and therefore directly applicable to state court proceedings.

2. Whether, assuming arguendo the incorporation of the double jeopardy provision of the Fifth Amendment in the Fourteenth Amendment and its direct applicability to the states, petitioner was "twice put in jeopardy" where he was charged with involuntary manslaughter and reckless homicide, offenses requiring identical proof, and a jury found him guilty of reckless homicide but was silent on the involuntary manslaughter and he secured a new trial on appeal which resulted in an identical jury verdict.

   a. Whether one asserting that he was "twice put in jeopardy where he was charged with involuntary manslaughter and reckless homicide and a jury found

him guilty of reckless homicide but was silent on the involuntary manslaughter and he secured a new trial on appeal which resulted in an identical verdict, was prejudiced by being put to trial on both offenses at the second trial.

b. Whether one who files a motion for a new trial and appeals from the denial thereof after he has been tried by jury in a state court for involuntary manslaughter and reckless homicide and a verdict of guilty for reckless homicide, relinquishes any possible defense of double jeopardy that may be applied to the second trial, if granted by the state appellate court.

STATEMENT OF CASE

Cichos, the petitioner, was charged on a two count amended affidavit, filed November 6, 1958, in the Circuit Court for Parke County, Indiana, with reckless homicide and involuntary manslaughter arising out of an automobile accident that resulted in the death of two people. (R. 1.)

Trial was held by jury resulting in a verdict finding Cichos guilty of the offense of reckless homicide as charged in count one of the affidavit. Thereafter he was sentenced to one to five years in prison and fined the sum of $500 plus costs. Cichos filed a motion for new trial which was overruled. He then appealed from the trial court's ruling on the motion for new trial.

His only assignment of error on appeal to the Supreme Court of Indiana was the overruling of the motion for new trial.

The Supreme Court of Indiana on July 2, 1962, granted Cichos a new trial. (R. 5-6.)

Cichos was thereafter brought to trial for involuntary manslaughter and reckless homicide. The State's demurrer to Cichos' plea of former jeopardy was sustained by the trial court (R. 19). The jury found Cichos guilty of reckless homicide on June 28, 1963 (R. 29). He was thereafter sentenced to one to five years in prison and a fine of $100. The Supreme Court of Indiana affirmed that conviction.

SUMMARY OF ARGUMENT

Petitioner would have this Court overrule *Palko v. Connecticut,* 302 U.S. 319 (1937), and make the double jeopardy provision of the Fifth Amendment directly applicable to the States by reason of incorporation in the Due Process Clause of the Fourteenth Amendment, without presenting a case involving a violation or infringement of the double jeopardy provision.

Even assuming *arguendo* the direct applicability of the Fifth's double jeopardy provision, petitioner was not "twice placed in jeopardy," except upon his own waiver by seeking a complete new trial. Petitioner's position on waiver, however, would necessitate this Court holding that there is a constitutional right to appeal and thereby overrule well established precedent of this Court.

Petitioner has even failed to show that he was prejudiced by the alleged double jeopardy.

Petitioner would have deeply entrenched rules of constitutional law changed so that he can go free after being twice convicted by a jury for the same offense. Petitioner would have this Court suspend justice in his particular case, but which would have profound effect upon American jurisprudence.

Petitioner's contentions are without merit and should be rejected by this Court.

ARGUMENT

I.

THE DOUBLE JEOPARDY PROVISION OF THE FIFTH AMENDMENT IS NEITHER ESSENTIAL TO A SCHEME OF ORDERED LIBERTY OR SO ROOTED IN THE TRADITIONS AND CONSCIENCE OF THE PEOPLE AS TO BE RANKED AS FUNDAMENTAL. IT SHOULD NOT BE HELD DIRECTLY APPLICABLE TO THE STATES THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Petitioner, in the case at bar, asks this Court to hold that the double jeopardy provision of the Fifth Amendment is incorporated in the Due Process Clause of the Fourteenth Amendment. Petitioner is asking this Court to overrule *Palko v. Connecticut,* 302 U.S. 319 (1937). Petitioner's contention, however, involves more than *Palko,* but also, in essence questions the validity of *Bartkus v. Illinois,* 359 U.S. 121 (1959) and *Abbate v. United States,* 359 U.S. 187 (1959).

If *Palko v. Connecticut, supra,* is wrong in its holding, then it must be based upon conclusions contrary to law and unsound reasoning. Petitioner's contention, therefore necessitates a thorough re-examination of the reasoning and conclusions of law propounded in *Palko.*

The Court in that case, speaking through Mr. Justice Cardozo, specifically held, upon the facts before it, that a Connecticut statute permitting appeals to be taken by the state did not infringe the Due Process Clause of the Fourteenth Amendment. The Court also held that the double jeopardy provision of the Fifth Amendment was not absorbed in the Due Process Clause of the Fourteenth.

The Court's reasoning was basically two-fold—(1) the application of the double jeopardy principle is essentially one involving policy and (2) as set forth in the Fifth Amendment it is not implicit in the concept of ordered liberty.

The Court reasoned, concerning the policy question, that double jeopardy principles were susceptible of many diverging, and not incorrect applications when it said:

> " . . . Right-minded men, as we learn from those opinions, could reasonably, even if mistakenly, believe that a second trial was lawful in prosecutions subject to the Fifth Amendment, if it was all in the same case. Even more plainly, right-minded men could reasonably believe that in espousing that conclusion they were not favoring a practice repugnant to the conscience of mankind. Is double jeopardy in such circumstances, if double jeopardy it must be called, a denial of due process forbidden to the States? The tyranny of labels [cite omitted] must not lead us to leap to a conclusion that a word which in one set of facts may stand for oppression or enormity is of like effect in every other." 302 U.S. 323

The divergence of opinion springs from the historical limitations on the granting of new trials in criminal cases. See opinion by Mr. Justice Story in *United States v. Gibert*, 25 Fed. Cas. 1287, 1294-1303 (1834). The importance of the early common law pleas of *autrefois acquit* and *autrefois convict* is not the cause of dispute. It is their application to modern-day modes of procedure that incites serious disagreement.

Practice at the time of the writing of the Constitution did not include a new trial for errors in criminal cases. Therefore, the effect of double jeopardy on a new trial was

not clearly envisioned by the framers of the Fifth Amendment. The extent of application, then, of double jeopardy to situations where a new trial was granted under modern procedure required a policy decision by the appellate courts.

Matters of policy, where not imbibed with clear-cut mandates, should be left to the discretion of the individual sovereigns. What may be the right policy for the federal legal system may not be right for the individual states' legal systems. Where reasonable minds differ in the legal philosophy underpinning double jeopardy, this Court should be reluctant to impose its policy decisions on the individual states in the absence of such a mandate—particularly where it retains an overseer position via the Fourteenth's Due Process Clause. This Court has applied some principles of double jeopardy to the states through the Due Process Clause. The issue here, however, goes much further, for petitioner is asking this Court to apply the double jeopardy principles of the Fifth Amendment to the states. The distinctions in application are clearly evidenced by *Palko v. Connecticut, supra,* and *Kepner v. United States,* 195 U.S. 100 (1904).

Mr. Justice Cardozo's reasoning that such an area reflecting divergent, but valid, policy views, in the absence of clear-cut constitutional mandate, should be left to individual state decision was valid in 1937 and is still valid today.

That brings us to the second rationale for the decision, i.e. the double jeopardy provision in the Fifth Amendment is not implicit in the concept of ordered liberty.

This Court clarified the phrase "implicit in the concept of ordered liberty" to mean those principles that could be

eliminated without causing justice to perish, or that their elimination would not sacrifice liberty or justice.

> " . . . Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them." 302 U. S. 325

Mr. Justice Cardozo went one step further when he pointed out the method for dividing those amendments in the Bill of Rights inherent in the Due Process Clause and those that were not when he said:

> " . . . Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . " 302 U.S. 328

This Court answered the immediate previous question in the negative because there is nothing shocking or of a persecuting nature in the state's demand that criminal trials be "free from the corrosion of substantial legal error."

Mr. Justice Frankfurter delineated this distinction in concurring in *Brock v. North Carolina,* 344 U.S. 424 (1953), when he said:

> " . . . A State falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted or prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time." 344 U.S. 429

Mr. Justice Frankfurter was obviously referring to a rule of fair play—due process means fair play. The double jeopardy provision of the Fifth Amendment encompasses substantially more than fair play as clearly evidenced by *Green v. United States,* 355 U.S. 184 (1957).

The complete retrial of an accused after he has purged the corrosive error of his trial by an appeal certainly does not infringe the fair play doctrine of the Due Process Clause. This Court, however, in *Green* said some complete retrials do infringe the double jeopardy provision of the Fifth Amendment. Therefore, to incorporate the double jeopardy provision of the Fifth into the Due Process Clause of the Fourteenth is to expand due process far beyond the mere fair trial and fair play concept, which would be unnecessary and unwarranted. The previously quoted rule enunciated by Mr. Justice Frankfurter which prevents calloused subjection to successive trials to thwart justice provides the individual with sufficient protection against the State. And, after all, what is the function of a constitution but to protect the individual from the oppressive and arbitrary action of the organized majority. The Bill of Rights and the Fourteenth Amendment were not adopted to merely afford a mere means of technical discharge. Their presence is to ensure justice—not undermine it.

As one writer has said:

> "Articulation of the policies to be served by the double jeopardy provision should not obscure the presence of an important countervailing consideration, the interest of society in preventing the guilty from going unpunished. While over emphasis of this factor may lead to abuse and a deprivation of the rights of the accused in circumstances where the risk of harassment is slight and that of improper

> acquittal is great the states interest in securing convictions should be given considerable weight." Note, 77 *Harv. L. Rev.*, 1272, 1274 (1964).

This has its most obvious manifestation in *Bartkus v. Illinois,* 359 U.S. 121 (1959) and *Abbate v. United States,* 359 U.S. 187 (1959) where this Court held that an acquittal in a state prosecution was no bar to prosecution for an identical offense in the federal system and vice versa. While the holdings in *Bartkus* and *Abbate* verge on the shocking, at first glance, they constitute recognition by this Court that iron-clad rules of double jeopardy might tend to undermine justice.

Justice means doing that which is right. But what is right defies stereotype and definition. It ultimately turns upon subjective analysis. Subjective analysis should generally be left to those courts applying their supervisory powers. The exception must lie where justice is denied in such a way as to be "so acute and shocking that our polity not endure it" and the super-ego of this Court must intervene.

This Court's reasoning, that double jeopardy application under modern procedure is a question of policy and not fundamental to ordered liberty, in *Palko v. Connecticut, supra,* is still valid, as it was in 1937 when propounded by Mr. Justice Cardozo. The holding in *Palko* should stand. The double jeopardy provision of the Fifth Amendment should not be made directly applicable to the States.

II.

ASSUMING ARGUENDO THE DIRECT APPLICABILITY OF THE DOUBLE JEOPARDY PROVISION OF THE FIFTH AMENDMENT TO THE STATES, PETITIONER WAS NOT PUT IN JEOPARDY TWICE.

Even assuming *arguendo* that the double jeopardy provision in the Fifth Amendment is incorporated in the Due Process Clause of the Fourteenth Amendment and directly applicable to the States, petitioner, in the case at bar was not "twice put in jeopardy." Petitioner's contention that his second trial violated the double jeopardy provision of the Fifth Amendment is preposterous in light of the facts, let alone under the applicable law.

Petitioner was charged by affidavit for causing the death of two people through the manner in which he drove an automobile. The affidavit contained two counts—one charging reckless homicide, Burns IND. STAT. ANN., § 47-2001, and the other involuntary manslaughter, Burns IND. STAT. ANN., § 10-3405. Both require the same proof, where a vehicle is involved. Only the punishment differs. *State v. Beckman,* 219 Ind. 176, 37 N.E.2d 531 (1941); *Rogers v. State,* 227 Ind. 709, 88 N.E.2d 755 (1949); *Ray v. State,* 233 Ind. 495, 120 N.E.2d 176, 121 N.E.2d 732 (1954). The jury found him guilty of reckless homicide. The jury's silence on the involuntary manslaughter count could hardly be deemed an acquittal when the two offenses are identical. It was nothing more than a manifestation of mercy. To call the jury's silence a finding of not guilty is wild speculation. To ask an appellate court to indulge in such speculation is to request judicial degradation.

Petitioner was put to trial the second time, after his successful appeal, on an affidavit charging the same offense

covered by two statutes. The jury again found him guilty of reckless homicide which prescribes the lesser penalty of the two. *Stroud v. United States,* 251 U.S. 15 (1919) is clearly controlling on such a fact pattern.

Stroud involved three successive trials for first degree murder. The first resulted in a death sentence. The second in life and the third for death. Under the federal statute the jury was permitted to fix the punishment. This Court in holding that the accused had not been put in jeopardy twice, said:

> "It is alleged that the last trial of the case had the effect to put the plaintiff in error twice in jeopardy for the same offense in violation of the Fifth Amendment to the Constitution of the United States. From what has already been said it is apparent that the indictment was for murder in the first degree; a single count thereof fully described that offense. Each conviction was for the offense charged. It is true that upon the second trial the jury added 'without capital punishment' to its verdict, and sentence of life imprisonment was imposed. . . . The fact that the jury may thus mitigate the punishment to imprisonment for life did not render the conviction less than one for first degree murder." [cite omitted.] 251 U.S. 17-18

Likewise, in the case at bar, the jury was merely mitigating the penalty by their verdict of guilty on the reckless homicide charge.

The facts in *Green v. United States,* 355 U.S. 184 (1957) are clearly distinguishable from those in the case at bar. Green was initially prosecuted for arson and felony murder. The jury found him guilty of arson and second degree murder. At his second trial, after a successful appeal, he was found guilty of felony murder. This Court treated the

jury's silence on felony murder in the first trial as an acquittal on a failure of proof by the prosecution and therefore a bar to subsequent prosecution for felony murder. While it was pointed out that second degree murder was a lesser included offense of felony murder, the distinctions in proof required cannot be ignored. Felony murder requires proof of a killing committed in the perpetration of a felony. Second degree murder is the willful malicious killing without premeditation. While the distinctions in proof are subtle, they nonetheless do exist. Therefore, it is quite logical to say that conviction on the second and silence on the first is tantamount to acquittal by the jury on the first.

By contrast, in the case at bar, it can not be logically said that the jury's silence is tantamount to acquittal where the proof required for the two offenses is identical. The *Green* case therefore provides petitioner with little comfort. It is clearly distinguishable from the case at bar.

A.

Petitioner was not prejudiced by being tried a second time for involuntary manslaughter where the jury rendered an identical verdict of guilty of reckless homicide.

Constitutional rights do not exist in a vacuum. Nor do they exist for the sole purpose of affording a technical means of discharge. It is therefore necessary for one asserting the infringement of some constitutional right to make a showing of how such infringement prejudiced his right to a fair trial or the rendering of justice.

One asserting a denial of his right to a speedy trial must show prejudice. *Finton v. Lane,* 356 F.2d 850 (7th Cir.

1966), cert. den., — U.S. —, 86 S.Ct. 1593 (1966). This Court has, however, made a prejudice *per se* application to certain constitutional provisions. The application has been one of prejudice *per se* in the sense that the infringement is *per se* a denial of a fair trial thereby commanding a new trial free of taint. This is true in the areas of confessions, *Miranda v. Arizona,* — U.S. —, 86 S.Ct. 1602 (1966), search and seizure, *Mapp v. Ohio,* 367 U.S. 643 (1962), and right to counsel, *Gideon v. Wainwright,* 372 U.S. 335 (1963). This Court has, however, declined to hold the denial of those rights a bar to further prosecution. A similar approach has been taken by this Court in trial publicity cases, *Sheppard v. Maxwell,* 382 U.S. 916, 86 S.Ct. 1507 (1966), *Irvin v. Dowd,* 366 U.S. 717 (1961), and First Amendment cases. *Book "Fanny Hill" v. Atty. Gen. Mass.,* — U.S. —, 86 S.Ct. 975 (1966).

Since infringements of the double jeopardy provision constitute a bar to prosecution, common sense requires there be a showing of prejudice by the double jeopardy.

There is an obvious parallel between speedy trial and double jeopardy in the sense that denials of either result in bars to prosecution. Just as prejudice must be shown to have resulted from the denial of a speedy trial, *Finton v. Lane, supra,* it should likewise be a requirement of one asserting that he had twice been placed in jeopardy. Just as delay *per se* does not constitute grounds for discharge, double jeopardy *per se* should not be grounds for discharge. Otherwise the double jeopardy provision becomes a mere technical means of discharge.

The Speedy Trial Clause of the Sixth and the double jeopardy provision of the Fifth can not logically receive applications identical to the other rights specified in the Bill of Rights. They are procedural rather than evidentiary.

Their impact can have a greater significance in law enforcement and criminal jurisprudence than any of their fellow evidentiary rights. Their violation stands as an automatic bar to prosecution. This Court should, therefore, use greater caution and restraint to avoid weighting the scales of justice in favor of the criminally accused. A requirement of a showing of prejudice maintains this thin balance.

A requirement of showing prejudice permeates this Court's past decisions in the double joepardy area. *Ciucci v. Illinois,* 356 U.S. 571 (1958); *Hoag v. New Jersey,* 356 U.S. 464 (1958); *Brock v. North Carolina,* 344 U.S. 424 (1953); *Brantley v. Georgia,* 217 U.S. 284 (1910).

Petitioner in the case at bar can not even make a prima facie showing of prejudice. The facts speak loudly and clearly. He was in no way prejudiced by going to trial a second time for involuntary manslaughter. The jury's verdict was identical to that in the first trial.

Petitioner was never convicted of involuntary manslaughter, but twice convicted of reckless homicide. Any prejudice to petitioner would be speculative at best. The juries reacted as though he were never charged with involuntary manslaughter.

To discharge the petitioner in the absence of prejudice would be a flagrant disregard for justice where the juries twice ignored the involuntary manslaughter charge to find him guilty of reckless homicide.

B.

Petitioner waived his alleged double jeopardy when he sought a complete new trial which was granted by the state appellate court.

Petitioner in the case at bar filed a motion for new trial after his first trial which had resulted in his conviction for

reckless homicide. The trial court overruled that motion. He thereupon appealed that ruling to the Supreme Court of Indiana. His sole assignment of error was the trial court's overruling of his motion for new trial. The Supreme Court of Indiana granted him a new trial—a complete new trial.

At the second trial he was precluded under Indiana law from asserting a defense of double jeopardy to the charge of involuntary manslaughter.

In *Morris v. State,* 1 Blackf. 37 (1819), the Supreme Court of Indiana held that the accused had waived his defense of double jeopardy by seeking a new trial where he had been indicted for burglary and larceny and acquitted of burglary but convicted of larceny. He was tried for both at the second trial which resulted in an identical verdict. The court said:

> "It is now objected, that the second trial for the burglary was improper; and that although it was productive of no direct inconvenience to the plaintiff, it may have had an improper influence against him, on the charge of larceny. This objection is untenable. Independently of the general rule, that he who desires a new trial, must receive it as to the whole case, it cannot be supposed, that where there are two charges in an indictment, that an acquittal as to one can possibly vitiate the verdict of guilty as to the other."

The same court later in *Ex Parte Bradley,* 48 Ind. 548 (1874), held that if double jeopardy existed in the case after the new trial had been granted it was upon the accused's consent and concurrence. The court said:

> ". . . The legislature has interposed and said to all persons thus circumstanced, that if you believe you

> have been unjustly and wrongfully convicted, you may have another trial on the express condition that the State shall have the right to place you on trial again for the grade or grades of the offense of which you were found not guilty; and in our judgment, when a defendant asks and obtains a new trial, he thereby waives the constitutional protection, and must take it as the whole case." 48 Ind. 557-558.

The Indiana statute in question is Burns IND. STAT. ANN., § 9-1902. The provision in the Constitution of Indiana, Art. 1, § 14, on double jeopardy is almost identical to that in the Fifth Amendment. The Indiana court reaffirmed its position on waiver in *State ex rel. Lopez v. Killigrew,* 202 Ind. 397, 174 N.E. 808 (1931).

Obviously Indiana law on the waiver issue is inconsistent with this Court's views in *Green v. United States,* 355 U.S. 184 (1957). That, however, is not dispositive of the issue in the case at bar or in its application to the States.

Green involved a federal prosecution and it must be viewed in the context of this Court acting in its supervisory capacity, for the waiver question takes on new dimensions when viewed under the Fourteenth Amendment.

Mr. Justice Black, speaking for the court in *Griffin v. Illinois,* 351 U.S. 12, 18 (1956), pointed out that "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review" and cited in support *McKane v. Durston,* 153 U.S. 684 (1894).

This Court in *McKane* said:

> ". . . A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the dis-

> cretion of the State to allow or not to allow such a review. . . .
>
> "It is, therefore, clear that the right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may be deemed proper." 153 U.S. 687-688.

Indiana has made one of the terms under which one convicted of crime may appeal, that he receives a complete new trial and waives the question of double jeopardy. This is clearly Indiana's right under *Griffin* and *McKane.*

Griffin v. Illinois, supra, and *McKane v. Durston, supra,* prevent this Court from applying the *Green* waiver doctrine to the States unless they are to be specifically overruled.

Petitioner, therefore, must take his appeal under Indiana's terms. Under Indiana law he has waived his alleged double jeopardy by obtaining a complete new trial.

CONCLUSION

Petitioner has failed to show that the Fifth Amendment's double jeopardy provision should be applied directly to the States, but even if it were he has failed to make out a case of double jeopardy under any standard.

WHEREFORE, Respondent prays the Court affirm the decision of the Supreme Court of Indiana.

Respectfully submitted,
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No. 45

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v.

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Respondent.

PETITION FOR REHEARING

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CITATIONS

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

PETITION FOR REHEARING

Petitioner presents his petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

Grounds for Rehearing

Petitioner respectfully submits that the interrelation of the Indiana offenses of reckless homicide [Burns Indiana Statutes Annotated §47-2001 (a)] and involuntary manslaughter (Burns Indiana Statutes Annotated §10-3405) has resulted in misconstruction of both the Indiana Supreme Court Decision and the law pertaining thereto. The majority opinion herein is predicated upon certain interpretations of the Indiana law as gleaned from the Indiana Supreme Court Opinion. It is submitted that such statements misconstrue the Indiana law and, even if such pronouncements by the Indiana Supreme Court have been correctly construed, such have, nevertheless, been changed by a subsequent decision of that Court.

Initially, the majority opinion is based upon the statement by the Indiana Supreme Court that it is the "practice" of the trial court in Indiana in cases of this nature "of telling the jury to return a verdict on only one of the charges in view of the limitation on penalty." However, in this case the jury was not told to return a verdict on only one count. In fact, Instruction No. 10 charges that:

> ". . . if you find defendant guilty but do not say on which Count then that is equivalent to finding defendant guilty on both Counts and then the Court would impose the highest penalty fixed by Statute and will not impose any penalty on the other Count. . . ."[1]

That same instruction also specially charged the jury that a failure to find guilt *on either charge was equivalent to acquittal on that charge.* That portion of the instruction is as follows:

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[1] Petitioner has included in the Appendix herein all instructions thought pertinent on this question.

"... if you find defendant guilty of either count of the affidavit and say nothing about the other count, that would be equivalent to finding him not guilty on the count you do not mention...."

As a matter of fact, had the jury been so charged to return a verdict on only one, it would be directly contrary to the Indiana procedures and statutes which provide that the court, not the jury, determines the punishment. Under Burns Indiana Statutes Annotated §9-1820 it is the court, not the jury, that determines the sentence in *felony* cases. The jury function is merely the determination of guilt or innocence on a particular charge. That statute is as follows:

"INDETERMINATE SENTENCES — VERDICT IN FELONIES—AGE—SENTENCE TO INDIANA REFORMATORY.—In all cases of felony tried hereafter, before any court or jury in this state, if the court or jury find the person on trial guilty of a felony, it shall be the duty of such court or jury to further find and state whether or not the defendant is over sixteen (16) years of age and less than thirty (30) years of age. If such defendant be found to be between said ages and be not guilty of treason or murder in the first or second degree, it shall only be stated in the finding of the court or the verdict of the jury that the defendant is guilty of the crime as charged, naming it, and that his age is that found to be his true age, and the court trying such, if such person has passed the full age of twenty-one (21) but has not passed the full age of thirty (30) years, and has not been theretofore convicted of a felony, the court shall sentence such person to the custody of the board of trustees of the Indiana Reformatory, as guilty of the crime in such finding or verdict, and that he be confined therein for a term not less than the minimum time prescribed by the statutes of this state as a punishment for such offense, and not more than the maximum time prescribed by the statutes therefor, sub-

ject to the rules and regulations established by such board of trustees, and it shall be the duty of the board of trustees of said reformatory, to receive all such convicted persons, and all existing laws requiring the courts of this state to sentence such persons, to the penitentiaries or prisons of this state, are hereby modified and changed as to make it the duty of such courts to sentence such prisoners to the Indiana Reformatory. The board of trustees may terminate such imprisonment when the rules and requirements of such reformatory have been lived up to and fulfilled, according to the provisions of this act: Provided, That if such person be between the ages of twenty-one (21) and thirty (30) years and shall have been therefore convicted of a felony, the court in its discretion may sentence such person to the Indiana State Prison."

In fact, Burns Indiana Statutes Annotated §47-2002 which permits the joinder of these two offenses involved in this case provides that only one "*penalty*" shall be imposed. Nothing therein contemplates the selection of such penalty by the jury by its failure to return a verdict on one count or the other.

Petitioner submits that even if the opinion of the Supreme Court of Indiana has been correctly construed as reversing the long established rule that silence amounts to an acquittal, nevertheless, such construction has been subsequently changed *sub silentio*. Petitioner submits that the law prior to the Indiana Supreme Court decision in this case had long held silence on one or more counts of a charge to amount to an acquittal. This was briefed fully in this cause. If the Indiana Supreme Court held in *Cichos v. State*, —— Ind. ——, 208 N.E. 2d 685 (1965) in its decision below that in cases of horizontal, nonincludible offenses, silence as to one count is not an acquittal, it (Indi-

ana Supreme Court) has, nevertheless, reaffirmed the original rule *since* its opinion in this case. Thus, in *Anderson v. State,* —— Ind. ——, 214 N.E. 2d 172 (1966), the Indiana Supreme Court was also concerned with horizontal, nonincludible offenses (in that case one count charged inflicting a wound while attempting to commit robbery and the second assault and battery with intent to commit the same robbery). These are also the type of horizontal, nonincludible offenses which the court below denominated in this case as different charges for "the same unlawful transaction." The court in *Anderson* stated that jury silence as to Count One "amounted to a finding of not guilty thereon." Whether this means that the *Anderson* case explains the *Cichos* decision below as accepting the proposition that jury silence has always been equivalent to acquittal in Indiana in regard to horizontal, nonincludible offenses or whether the Indiana Supreme Court in *Anderson* has, in fact, changed the *Cichos* verbiage is of no consequence. The fact remains that the law clearly recognizes jury silence as acquittal in Indiana.[2]

Silence, by all logic, must be an acquittal in a criminal proceeding. A criminal defendant certainly could not be sentenced for involuntary manslaughter on a conviction of reckless homicide only.

CONCLUSION

These offenses are admittedly duplicitous as charging identical elements under two separate offenses. This does not diminish or mitigate the import of dual jeopardy on the second trial; it rather aggravates such. To affirm the

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[2] Actually, as the dissenting opinion of Mr. Justice Fortas herein points out, the cause should be reversed because of the *dual jeopardy* on the second count whether its conclusion resulted in an acquittal or in a conviction.

conviction here would be to permit enactment of numerous offenses with identical elements which could not only be all charged against a defendant at one trial but subsequently could be charged in sequential fashion on a retrial were he convicted on only one of such counts. The fact remains clear in this case that Petitioner stood in jeopardy four times at two trials for one substantive offense.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, the judgment of the Supreme Court of the State of Indiana be reversed.

JOHN P. PRICE
CLEON H. FOUST
WARREN BUCHANAN
JOHN B. McFADDIN

Counsel for Petitioner

Certificate of Counsel

I, John P. Price, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

Counsel for Petitioner

APPENDIX

Court's Preliminary Instruction No. 5 (Given)

"The defendant has entered a general plea of not guilty to the two charges contained in the two Counts of the affidavit. And upon the issues joined you may find the defendant guilty generally as charged in the affidavit, if the evidence warrants beyond a reasonable doubt, or not guilty generally as charged in the affidavit.

"And a general finding of guilty as charged in the affidavit in this cause is equivalent of a finding of guilty on the Count carrying the highest offense.

"You may find the defendant guilty, if the evidence warrants beyond a reasonable doubt, on the First Count of the affidavit charging Reckless Homicide, or guilty, if the evidence warrants beyond a reasonable doubt, on the Second Count of the said affidavit charging Involuntary Manslaughter.

"You can find the defendant guilty, if the evidence warrants beyond a reasonable doubt, of one of the included offenses in Count Two of the affidavit, of either assault and battery or of simple assault"

Court's Instruction No. 9 (Given)

"The Court instructs you that the following numbered verdicts cover any possible verdict that this jury is authorized to return and they are as follows:

'1. We, the jury, find the defendant not guilty.

'2. We, the jury, find the defendant guilty as charged and find his age to be ——— years.

'3. We, the jury, find the defendant guilty of Reckless Homicide as charged in Count One of the Affidavit and fix his age to be — years.

'4. We, the jury, find the defendant guilty of Reckless Homocide as charged in Count One of the Affidavit and fix his punishment at:

a) A fine of $——. (Not less than $100 nor more than $1000.), or,

b) Imprisonment on the Indiana State Farm for ———. (Anytime not less than 60 days nor more than 6 months.) (Designate days or months), or,

c) A fine of $——— (not less than $100 nor more than $1000) and imprisonment in the Indiana State Farm for ————.) (Anytime not less than 60 days nor more than 6 months.)

(Designate days or months).

'5. We, the Jury, find the defendant guilty of Involuntary Manslaughter as charged in Count Two of the Affidavit and find his age to be ——— years.

'6. We, the jury, find the defendant guilty under Count Two of the Affidavit of the included offense of Assault and fix his punishment at:

a) A fine of $———. (Not exceeding $1000), or,

b) A fine of $———. (Not exceeding $1000) and imprisonment on the Indiana State Farm for ———. (Anytime not exceeding six months). (Designate days or months).

'7. We, the jury, find the defendant guilty under Count Two of the Affidavit of the included offense of Assault and fix his punishment at:

a) A fine of $———, (Not exceeding $500), or,

b) A fine of $————, (Not exceeding $500) and imprisonment on the Indiana State Farm for ———— (anytime not exceeding six months)."

Court's Instruction No. 10 (Given)

"The Court instructs you that if you should find the defendant guilty you also prescribe and fix the penalty in case it is a misdemeanor and in case it is a felony the statute fixes the penalty and you do not fix the penalty.

"A misdemeanor is where the punishment is by a fine or imprisonment in the County Jail or the State Farm, or by both a fine and such imprisonment, and in case of a felony the statute fixes the penalty.

"And a felony is where the penalty prescribed by statute fixes an imprisonment in one of the State Prisons for an indeterminate period of years, the limits being set by statute.

"In case you find defendant guilty of a felony, you only find him guilty and his age. If he is found to be over 30 years of age he will be sent to the State Prison and if he is under 30 years of age he will be sent to the Reformatory.

"If you find defendant guilty on either count of the affi-

davit and say nothing about the other count that would be equivalent to finding him not guilty on the count you do not mention.

"Under the reckless homicide statute, which is Count One of the affidavit, you could find defendant guilty of a felony or a misdemeanor depending upon the penalty you prescribe.

"Under the involuntary manslaughter charge, which is Count Two of the affidavit, you could find him guilty of a felony only or you could find him guilty of an included offense either of assault and battery or simple assault, either of which included offenses would be a misdemeanor and you are to fix the penalty which is indicated on the form of verdicts given you.

"If you find defendant guilty but do not say on which Count then that is equivalent to finding defendant guilty on both Counts and then the Court would impose the highest penalty fixed by statute and will not impose any penalty on the other Count.

"If you will examine the written verdicts which the Court will now hand you, you can see that they provide for any possible verdict you may desire and are authorized to return and you are to fill in any blanks as indicated.

"If you should find the defendant not guilty, all you will need to do is to return that verdict with the signature of the foreman. If he is found not guilty and no count is

mentioned, he is acquitted on both counts of the affidavit."

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 45.—October Term, 1966.

Ronald R. Cichos, Petitioner, v. State of Indiana. | On Writ of Certiorari to the Supreme Court of Indiana.

[November 14, 1966.]

Mr. Justice White delivered the opinion of the Court.

Following petitioner's trial in the Circuit Court for Parke County, Indiana, under a two-count affidavit charging him with reckless homicide and involuntary manslaughter, the jury returned a verdict reciting only that he was guilty of reckless homicide. Petitioner was sentenced to one to five years in prison and was fined $500 plus court costs. He appealed, and the Supreme Court of Indiana granted a new trial. Petitioner was retried on both counts, and the second jury returned the same verdict as the first. He was again sentenced to one to five years in prison but was fined only $100 plus court costs. The Supreme Court of Indiana affirmed this reckless homicide conviction, rejecting petitioner's contention that his retrial on the involuntary manslaughter count had subjected him to double jeopardy in violation of the Indiana and United States Constitutions.[1]

Asserting that the first jury's silence with respect to the manslaughter charge amounted to an acquittal under Indiana law and that his retrial on that charge placed him twice in jeopardy, compare *Green* v. *United States*, 355 U. S. 184, petitioner presented a single question in his petition for certiorari which we granted: Is the Fifth

[1] "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U. S. Const., Amend. 5. "No person shall be put in jeopardy twice for the same offense." Ind. Const., Art. I, § 14.

Amendment's prohibition against placing an accused in double jeopardy applicable to state court prosecutions under the Due Process Clause of the Fourteenth Amendment?

Because of the following considerations, which have more clearly emerged after full briefing and oral argument, we do not reach the issue posed by the petitioner and dismiss the writ as improvidently granted.

1. The Indiana statutes define involuntary manslaughter as the killing of "any human being . . . involuntarily in the commission of some unlawful act." Ind. Stat. Ann. § 10–3405 (1956). The statutory penalty is two to 21 years imprisonment.[2] The crime of reckless homicide, created in 1939 as part of Indiana's comprehensive traffic code, is committed by anyone "who drives a vehicle with reckless disregard for the safety of others and thereby causes the death of another person." Ind. Stat. Ann. § 47–2001 (a) (1965). For this crime, a fine and a prison term of from one to five years are authorized.

Recognizing the inherent overlap between these two crimes in cases of vehicular homicide, the Indiana Legislature has provided that

> "[A] final judgment of conviction of one (1) of them shall be a bar to a prosecution for the other; or if they are joined in separate counts of the same indictment or affidavit, and if there is a conviction for both offenses, a penalty shall be imposed for one (1) offense only." Ind. Stat. Ann. § 47–2002 (1965).

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[2] Indiana adopted the common-law crime of involuntary manslaughter early in its history. The crime has traditionally been applied by the Indiana courts to cases of vehicular accidents resulting in death. *E. g., Smith* v. *State*, 186 Ind. 252, 115 N. E. 943 (auto accident); *State* v. *Dorsey*, 118 Ind. 167, 20 N. E. 777 (railroad accident).

The Indiana courts have also recognized that reckless homicide "is a form of involuntary manslaughter," *Rogers* v. *State*, 227 Ind. 709, 715, 88 N. E. 2d 755, 758. Proof of reckless homicide necessarily establishes an unlawful killing that amounts to involuntary manslaughter. Both crimes require proof of the same elements to sustain a conviction under Indiana law. See *Rogers* v. *State, supra; State* v. *Beckman*, 219 Ind. 176, 37 N. E. 2d 531. Thus, the effect of charging the two crimes in a single affidavit, as occurred in this case, was to give the jury the discretion to set the range of petitioner's sentence at two to 21 years by convicting him of involuntary manslaughter or at one to five years by convicting him of reckless homicide. As the Indiana Supreme Court in the case before us explained, "the offenses here involved are statutorily treated more as one offense with different penalties rather than viewing reckless homicide as an included offense in involuntary manslaughter."

2. Petitioner does not assert that he should not have been tried again for reckless homicide. His only claim is that he should not have been tried again for involuntary manslaughter as well as reckless homicide because the jury's silence at his first trial with respect to involuntary manslaughter was legally an acquittal on this charge.

However, the Indiana Supreme Court squarely rejected this interpretation of the first jury's verdict. The court distinguished a long line of Indiana cases which have held that a jury's silence must be deemed an acquittal.[3] Because of the identity of the elements of

[3] This doctrine developed in response to contentions that silence on any count required the setting aside of the entire verdict under the common-law rule that a defendant has an absolute right to a jury verdict on all charges for which he is tried. See *Weinzorpflin* v. *State*, 7 Blackf. (Ind.) 186 (1844). Since a reckless homicide conviction is a statutory bar to further prosecution for involuntary

these two crimes, and because the Indiana Supreme Court knew of "the trial court practice of telling the jury to return a verdict on only one of the charges in view of the limitation on penalty," [4] the court concluded that "a verdict of guilty of reckless homicide does not logically exclude the possibility of such a verdict on the charge of involuntary manslaughter." Therefore, "[T]he logic of the principle which states silence is equal to an acquittal is perhaps made inappropriate to charges of these offenses, related to the same unlawful transaction . . . . Rather than treat the silence of the jury in the involuntary manslaughter count in this case as an acquittal, the better result would seem to be to hold that the reckless homicide verdict encompassed the elements of involuntary manslaughter, and that appellant was simply given the lesser penalty."

In the face of the Indiana statutory scheme and the rulings of the Indiana Supreme Court in this case, we cannot accept petitioner's assertions that the first jury acquitted him of the charge of involuntary manslaughter and that the second trial therefore placed him twice in jeopardy. Consequently, we do not reach or decide the question tendered by the petition for certiorari, and the writ is dismissed as improvidently granted.

It is so ordered.

While concurring with the Court's opinion, MR. JUSTICE BLACK adheres to his views in *Bartkus* v. *Illinois*, dissent, 359 U. S. 121, 150, to the effect that the Fourteenth Amendment makes the double jeopardy provision of the Fifth Amendment applicable to the States.

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manslaughter, § 47–2002, *supra*, petitioner cannot be adversely affected by the jury's silence with respect to the involuntary manslaughter count.

[4] The judge's charge to the jury in the first trial is not a part of the record in this case.

SUPREME COURT OF THE UNITED STATES

No. 45.—October Term, 1966.

Ronald R. Cichos, Petitioner, v. State of Indiana.	On Writ of Certiorari to the Supreme Court of Indiana.

[November 14, 1966.]

Mr. Justice Fortas, with whom The Chief Justice and Mr. Justice Douglas join, dissenting.

If this were a federal case, it would, in my view, be covered by *Green* v. *United States*, 355 U. S. 184 (1957). In *Green*, the defendant was not acquitted of the first degree murder charge at the first trial. Just as in the present case, the jury did not return a verdict on that count, but convicted Green on the lesser charges of arson and second degree murder. But this Court held that Green could not be retried on the first degree murder charge. It clearly and unmistakably held that whether Green was "acquitted" of the greater offense was of no consequence. He had been exposed to jeopardy. See 355 U. S., at 188, 190–191. So, in the present case, it is of no consequence whether the silence of the jury on the involuntary manslaughter count amounted to acquittal. Petitioner was put in jeopardy on that count and cannot again be tried on that charge.

The only difference between *Green* and the present case—except as to the jurisdictions—is that in *Green*, on the second trial, the defendant was convicted on the aggravated count. In the present case, petitioner was again convicted on the less serious charge. I cannot see that this can justify a difference in result. Petitioner should not have been retried on an affidavit including the more serious charge, which was not involved in the appeal. That charge was dead—beyond resuscitation. Its wrongful inclusion in the indictment was materially

harmful to petitioner. First, it exposed him to the hazards of prosecution and conviction for the more onerous offense. Second, it again gave the prosecution the advantage of offering the jury a choice—a situation which is apt to induce a doubtful jury to find the defendant guilty of the less serious offense rather than to continue the debate as to his innocence. See *United States ex rel. Hetenyi* v. *Wilkins*, 348 F. 2d 844 (C. A. 2d Cir. 1965), cert. denied, 383 U. S. 913 (1966). And beyond the question of injury to the petitioner in this particular case is the fact that the procedure which Indiana used chills the right of appeal. It "has the necessary effect of unlawfully burdening and penalizing the exercise of the right to seek review of a criminal conviction." *United States* v. *Ewell*, 383 U. S. 116, 130 (1966) (dissenting opinion). Defendants in Indiana in this type of case are admonished that if they appeal from a conviction on the less onerous charge they do so at the peril that on the next trial they may be tried, and possibly convicted, on the more serious count.

This is a State case. But the Fourteenth Amendment's requirement of due process, in my view, certainly and clearly includes a prohibition of this kind of heads-you-lose, tails-you-lose trial and appellate process. See the dissent of Mr. Justice Black in *Bartkus* v. *Illinois*, 359 U. S. 121, 150 (1959); *Brock* v. *North Carolina*, 344 U. S. 424, 429, 440 (1953) (dissenting opinions of Vinson, C. J., and Douglas, J.).

The Second Circuit's views are in accordance with the position stated herein. See *United States ex rel. Hetenyi* v. *Wilkins*, *supra*.

I would reverse and remand.